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SUPREME COURT OF THE UNITED STATES.

No. 695.

STEPHEN E. JONES, ASSIGNEE IN BANKRUPTCY OF CHARLES H. CLIFTON, APPELLANT,

vs.

CHARLES H. CLIFTON AND NANNIE W. McN. CLIFTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 20, 1878.

See opinion of Judge Ballard
7 Central Law Journal p 89.

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1 *Caption.*

Proceedings of the circuit court of the United States for the district of Kentucky, at a special term begun and held at the Federal court hall in the city of Louisville, on Wednesday, June 5th, A. D. 1878.

Present, the honorable Bland Ballard, judge of the United States for the district of Kentucky.

STEPHEN E. JONES, ASSIGNEE IN BANKRUPTCY of Charles H. Clifton, complainant,
vs.
CHARLES H. CLIFTON AND NANNIE WILLIAMS McNAIRY CLIFTON, defendants.

Be it remembered that heretofore, to wit, on the 24th day of October, 1876, came the complainant, Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, and filed in the clerk's office of said court his bill of complaint against the defendants, Charles H. Clifton, and Nannie Williams McNairy Clifton, which is as follows:

Bill of complaint.

In the circuit court of the United States for the sixth circuit and district of Kentucky, at Louisville.

To the honorable judges of the circuit court of the United States within and for the sixth circuit and district of Kentucky, sitting in equity:

Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, bankrupt, of Louisville, in the district of Kentucky, and a citi-
2 zen of the State of Kentucky, brings this bill of complaint against the said Charles H. Clifton, bankrupt, and against Nannie Williams McNairy Clifton, his wife, both of the county of Jefferson, in the said district, and both citizens of the State of Kentucky.

And thereupon your orator complains and says, that heretofore, to wit, on the fourth day of December, A. D. 1875, the said Charles H. Clifton, of the county of Jefferson, in the said district, and a citizen of the State of Kentucky, was adjudged a bankrupt in and by the district court of the United States for the district of Kentucky, sitting at Louisville, on his own petition filed on the said day, in accordance with the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

And your orator states, that on the 28th day of December, A. D. 1875, at the first meeting of creditors he was duly chosen assignee of all the estate and effects of the said bankrupt, by the greater part in number and value of the creditors of the said bankrupt who had proved their debts.

And your orator further says, that he accepted, in writing, the said trust within five days thereafter; that the choice of your orator as assignee as aforesaid was approved by the judge of the said district court, and that an assignment was made to your orator by John
3 H. Ward, one of the registers of the said district court, according to the provisions of the act aforesaid. A duly certified copy of the said adjudication of bankruptcy, and a duly certified copy of the said assignment, marked A and B respectively, are hereto annexed, and are prayed to be taken as part of this bill.

And your orator further states that heretofore, to wit, on the twenty-third day of October, A. D. 1872, the said Charles H. Clifton was in his own right the owner and seized in fee of the real estate, and the owner and possessed of the personal property described as follows, to wit: All that tract or parcel of land lying and situate in the city of Louisville, and State of Kentucky, beginning at a point on the west side of Buchanan street one hundred feet southwardly from the southwest corner of Franklin and Buchanan street; thence along said Buchanan street southwardly fifty feet; thence at right angles and parallel to Franklin street westwardly one hundred and fifty nine feet; thence at right angles northwardly and parallel to Buchanan street fifty feet; thence to the beginning.

And also the five following policies of life insurance issued to the said Charles H. Clifton for insurance on his own life, viz:

One policy issued to him by the Connecticut Mutual Life In-
4 surance Company, of Hartford, Connecticut, number 80685, for ten thousand dollars, dated the thirty-first day of January, in the year eighteen hundred and sixty-eight, and payable on the sixteenth day of December, in the year eighteen hundred and eighty-five, or at the said Charles' death.

Another policy, issued to him by the same company on the fifteenth day of March, in the year eighteen hundred and seventy-two, for ten thousand dollars, payable at the said Charles' death, and numbered 117158.

Another policy, issued to him by the Mutual Benefit Life Insurance Company, of Newark, New Jersey, numbered 70157, for ten thousand dollars, dated the twenty-seventh day of March, in the year eighteen hundred and seventy-two, at payable at the said Charles' death.

Another policy, issued to him by the Ætna Life Insurance Company, of Hartford, Connecticut, numbered 29307, for ten thousand dollars, dated the sixteenth day of December, in the year eighteen hundred and sixty-six, and payable nineteen years after date, or at the said Charles' death.

And also another policy, issued to him by the said last-named com-
pany, numbered 69305, for ten thousand dollars, dated the thirty-
5 first day of December, in the year eighteen hundred and sixty-nine, and payable twenty-one years from date, or at the said Charles' death.

And your orator further states, that the said Charles, being so the owner and seized and possessed of the said real estate and personal property, did on the said twenty-third day of October, A. D. 1872, by an instrument in writing of the said date, styled therein a deed poll, attempt and pretend, for the consideration therein expressed of love and affection, to grant and convey the real estate aforesaid, and to assign, set over, and deliver the personal property aforesaid to his wife, the respondent, Nannie Williams McNairy Clifton, in fee, as and for her own separate estate, free from the control, use, and benefit of her said husband, but your orator says that the said Charles nevertheless caused to be inserted in the said pretended deed of conveyance and as part thereof a clause of reservation, revocation, and appointment in the words and figures following, to wit:

"But it is provided and is now so declared that the said Charles H. Clifton doth reserve, retain, and hold the power to revoke the grant and assignment herein made in whole, or in part or parts, to any uses he may
appoint, and to such person or persons as he may designate, and
6 may cause such uses to spring or shift as he may declare. But

in default of appointment or appointments, and to the extent which he may quit to appoint, declare, or designate all the estate, land and policies included, as such part or parts as have not been appointed or concerning which there has been no declaration of use, or designation of person or persons, under the power reserved, shall remain to her, the said Nannie, and her heirs forever as her separate estate as aforesaid."

And your orator states that on the day of the date of the said pretended deed of conveyance the said Charles acknowledged the same before the clerk of the county court of Jefferson County, in the State of Kentucky, and the same was recorded in the office of the said clerk as prescribed by law. A duly certified copy of the said instrument, marked C, is hereto annexed, and is prayed to be taken as part of this bill.

And your orator, further complaining, states that on the first day of April, A. D. 1873, the said Charles H. Clifton was, in his own right, the owner and seized in fee of the real estate described as follows, to wit: All that tract or parcel of land lying and situate in the city of Louisville and State of Kentucky, and on the south side of Main street, in
7 said city, between Fifth and Sixth streets, in said city, having twenty-six feet and three inches front on said Main street, running south the same width two hundred feet, more or less, to an alley, the same being the western quarter of half-acre lot numbered seventy-eight, as designated on the plan of Louisville, being number 198 West Main street, in said city.

And also that tract or parcel of land lying and situate in the county of Jefferson, and State of Kentucky, on the western side of the Bardstown turnpike, and about a quarter of a mile from said turnpike, and principally opposite Monks' place, on said turnpike, bounded on the eastern side by the land of McBurnie's heirs or devisees or assignees and by Daniel Doup's heirs or devisees or assigns; on the southern side by the land of William Scrodt, subject to right of way in favor of Bishop McCloskey, or the Catholic Church; on the western side by the land of Bishop McCloskey, or the Catholic Church, Jasper Garloch, M. Aguener; and on the northern side by a lane running to said turnpike, the whole of said tract or parcel of land containing thirty-eight acres more or less.

And your orator further states that the said Charles, being so
8 the owner and seized of the said real estate last above described, did on the said first day of April, A. D. 1873, by another instrument of writing, of the said last named date, styled therein a deed poll, attempt and pretend for the consideration, as therein expressed, of love and affection, to grant and convey the said real estate last above described to his wife, the said Nannie Williams McNairy Clifton, in fee, for her sole and separate use, free from the control, use, or benefit of her said husband; but your orator states that the said Charles, nevertheless, caused to be inserted in the said last named pretended deed of conveyance, and as part thereof, a clause of reservation, revocation, and appointment, in the words and figures following, to wit:

"But it is provided and is now so declared, that he, the said Charles H. Clifton, doth reserve, retain, and hold the power to revoke the grants, and each and both herein made, in whole or in parts of each or both, and appoint to any uses, and to such person or persons as he may designate either by deed or in writing in the form of and to take effect as a devise or devises under the statute of wills of Kentucky, and may cause such uses to spring or shift as he may declare. But in default of appointment or appointments by him, and to the extent he may fail to appoint

or declare or designate each of said tracts or parcels of land, and all estate as such part or parts as have not been appointed or concerning which there has been no declaration of use or designation or person or persons in the form aforesaid under the power reserved to him, shall remain to her, the said Nannie, and her heirs forever, as her separate estate as aforesaid."

And your orator states that on the second day of April, A. D. 1876, the said Charles acknowledged the said last-named pretended of conveyance before the clerk aforesaid, and the same was recorded in the office of the said clerk as prescribed by law. A duly certified copy of the said second named instrument, marked D, is hereto annexed, and is prayed to be taken as part of this bill.

And your orator further states that the real estate and personal property so attempted and pretended to be conveyed by the said two instruments, comprised a very large part in value of the then estate of the said Charles H. Clifton, and were then at least of the value of seventy-five thousand dollars.

And your orator says that he is advised and believes and so charges that the said two instruments were and are null and void, and of no validity or effect whatever, and that nothing passed by them or either of them, from said Charles to his said wife, the said Nannie, but that the whole of the said real estate and personal property therein mentioned were the property and the estate of the said Charles after, as the same had been his property and estate before the making thereof, and continued to be his property and estate, and under his absolute dominion and control, for his own use and benefit, down to the time of the making of the said adjudication in bankruptcy against him as aforesaid, and of the aforesaid assignment made to your orator in pursuance thereof and in accordance with law.

And your orator further states that the making and recording of the said two instruments were a contrivance and scheme on the part of the said Charles H. Clifton to cheat, hinder, and defraud his future creditors, and to evade the payment of any debts he might thereafter contract, by an attempted conveyance of the title to the real estate and personal property therein mentioned to his said wife, so as to place the said title beyond the reach of such creditors, at the same time reserving to himself the use, control, and dominion over the said real and personal property for his own benefit.

And your orator says that he is advised and believes, and so charges, that the said two instruments were and are in effect an attempt on the part of the said Charles to vest the title to said property in his said wife, to be held by her in trust for his use and benefit, free from his said debts, and that the said instruments are null and void and of no validity or effect whatever.

And your orator says that the now unpaid debts of the said Charles, proved against his estate, under the aforesaid adjudication of bankruptcy against him, amount to at least the sum of thirteen thousand dollars.

And your orator further states that he is advised and believes, and so charges, that the title to the said real estate and personal property described in the two pretended deeds aforesaid passed to and vested in him as assignee in bankruptcy of the said Charles as aforesaid by and in virtue of the assignment made to him as such assignee as hereinbefore set out, and that he is entitled to the possession of the same, to be administered by him as assets for the benefit of the creditors of the said Charles who have proved or may prove their debts against his estate in bankruptcy as aforesaid. But that your orator says that the

said Charles and Nannie are in the possession of the said real and personal property, and are unwilling and refuse to surrender and deliver possession of the same or any part thereof to your orator to be
12 administered by him as aforesaid.

And your orator says that the said two pretended deeds of conveyance hereinbefore set out, and which appear of public record as above stated, constitute and cast a shadow and cloud upon the title of your orator as aforesaid, and will, unless declared null and void by your honor's decree, prevent and obstruct your orator in making sale and disposition of the said real and personal property for the purpose of being administered as aforesaid in the said proceedings in bankruptcy against the said Charles H. Clifton and his estate.

In consideration whereof, and forasmuch as your orator is entirely remideless in the premises at law, and can only have relief in a court of equity, where matters of this nature are cognizable and relievable:

To the end, therefore, that the said Charles H. Clifton and Nannie Williams McNairy Clifton, his wife, may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated; and that the two pretended deeds of conveyance aforesaid, made as above stated by the said Charles to the said Nannie, and each of them, may be de-
13 creed and declared, by decree of this honorable court, to be null and void, and of no validity or effect, and that the said defendants may be ordered, decreed, and compelled to surrender and deliver possession of the said real and personal property for the purpose of being administered as aforesaid to your orator; and that your orator may be further and otherwise relieved in the premises according to equity and good conscience:

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said Charles H. Clifton and Nannie Williams McNairy Clifton, his wife, thereby commanding them and each of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator shall ever pray.

B. H. BRISTOW, AND
JAMES A. BEATTIE,
Solicitors & Counsel for Complainant.

EXHIBIT A.

Exhibit A referred to in the bill of complaint is as follows:

FORM NO. 5.

Adjudication of bankruptcy upon debtor's petition.

14 In the district court of the United States for the district of Kentucky. In bankruptcy.

In the matter of Charles H. Clifton, by whom a petition for adjudication in bankruptcy was filed on the 4th day of December, A. D. 1875, in said court.

At Louisville, in said district, on the 4th day of December, A. D. 1875, before J. H. Ward, one of the registers of said court in bankruptcy:

I, the undersigned, a register of said court in bankruptcy, upon good proof before me, J. H. Ward, register, taken, do find that the said Chas. H. Clifton has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and I do hereby declare and adjudge him a bankrupt accordingly.

J. H. WARD,
Register in Bankruptcy.

A true copy.
Test.

J. H. WARD,
Register.

EXHIBIT B.

Exhibit B referred to in the bill of complaint is as follows:

FORM NO. 18.

Assignment of bankrupt's effects.

In the district court of the United States for the district of Kentucky.
In bankruptcy.

In the matter of Charles H. Clifton, bankrupt.

DISTRICT OF KENTUCKY, *ss:*

Know all men by these presents, that Stephen E. Jones, of the city of Louisville, in the county of Jefferson and State of Kentucky, in said district, has been duly appointed assignee in said matter.

Now, therefore, I, J. H. Ward, register in bankruptcy, by virtue of the authority vested in me by the 14th section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Stephen E. Jones, assignee as aforesaid, all the estate, real and personal, of the said Charles H. Clifton, bankrupt aforesaid, including all the property, of whatever kind, of which he was possessed or in which he was interested or entitled to have on the 4th day of December, A. D. 1875, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act;

To have and to hold all the foregoing premises to the said Stephen E. Jones, assignee, and his heirs forever, in trust nevertheless for the uses and purposes with the powers and subject to the conditions
16 and limitations set forth in said act.

In witness whereof, I, the said J. H. Ward, register, have hereunto set my hand and caused the seal of said court to be affixed this 29th day of December, A. D. 1876.

[L. S.]

J. H. WARD,
Register.

DISTRICT OF KENTUCKY:

I, Austin Ballard, clerk of the district court of the United States for said district, at Louisville, certify that the within is a true copy of the assignment of all the estate, real and personal, of the within named

Charles H. Clifton, bankrupt, by J. H. Ward, register, to Stephen E. Jones, assignee.

Witness my signature and the seal of said court, this 24th day of October, A. D. 1876, and of our Independence the 101st.

[L. S.] AUSTIN BALLARD,
Clerk,
By ROBT H. BRENT,
Deputy.

EXHIBIT C.

Exhibit C, referred to in the bill of complaint, is as follows:

This deed poll executed by Charles H. Clifton this twenty-third day of October, in the year eighteen hundred and seventy-two, and by him the same day delivered to the grantee, Nannie Williams McNairy
17 Clifton, wife of said Charles H. Clifton, witnesseth:

That for and in consideration of the love and affection he the said Charles has for his said wife, the said Nannie, he doth hereby give, assign, and grant, and possession deliver, to his said wife, the said Nannie, all that tract or parcel of land lying and situate in the city of Louisville and State of Kentucky, beginning at a point on the west side of Buckanan street one hundred feet southwardly from the southwest corner of Franklin and Buckanan street, thence along said Buckanan street southwardly fifty feet, thence at right angles and parallel to Franklin street westwardly one hundred and fifty-nine feet, thence at a right angle northwardly and parallel to Buchanan street fifty feet, thence to the beginning; to hold to her the said Nannie, and her heirs forever, as her own separate estate, free from the control, use, and benefit of her husband and all others; and the said Charles doth hereby confer upon said Nannie and invest her with power to appoint said estate, or a part or parts thereof, as often as she may choose to exercise the same, by joint deed with her said husband, and he doth also confer upon her the power to appoint the same, or any part or parts thereof, by a writing in the form of,
18 and to take effect as, a will under the statutes of Kentucky.

And the said Charles H. Clifton, for and in consideration of the love and affection he has for his said wife Nannie Williams McNairy Clifton, doth hereby assign and set over to her, to be held as her separate estate, in the same mode and with the same powers, free from the control of her husband and all others, as are stated or given in reference to the land above conveyed, the following policies of life insurance, which have been issued to him, and which he has delivered to said Nannie, to wit:

One policy issued to him by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, number 80686, for ten thousand dollars, dated the thirty-first day of January, in the year eighteen hundred and sixty-eight, and payable on the sixteenth day of December, in the year eighteen hundred and eighty-five, or at his death.

Another policy by the same company, issued to him on the fifteenth day of March, in the year eighteen hundred and seventy-two, for ten thousand dollars, payable at his death, and numbered 117158.

Another policy issued to him by the Mutual Benefit Life Insurance Company of Newark, New Jersey, number 70157, for ten thousand dollars, dated the twenty-seventh day of March, in the year eighteen
19 hundred and seventy-two, and payable at his death.

Another policy issued to him by the Ætna Life Insurance Company of Hartford, Connecticut, number 29307, for ten thousand dollars,

dated the sixteenth day of December, in the year eighteen hundred and sixty-six, and payable nineteen years after date, or at his death.

And also another policy by the last mentioned company, number 69305, for ten thousand dollars, dated the thirty-first day of December, in the year eighteen hundred and sixty-nine, and payable twenty-one years from date, or his death.

All of which policies have this day of this deed been delivered and possession given, as well as of the said land, to her the said Nannie to hold as her separate estate as aforesaid.

But it is provided and is now so declared that he, the said Charles H. Clifton, doth reserve, retain, and hold the power to revoke the grant and assignment herein made in whole or in part or parts to any uses he may appoint, and to such person or persons as he may designate, and may cause such uses to spring or to shift as he may declare. But in default of appointment or appointments, and to the extent to which he may quit to appoint, declare, or designate, all the estate, land, and policies included as such part or parts as have not been appointed or
20 concerning which there has been no declaration of use, or designation of person or persons under the power reserved, shall remain to her, the said Nannie, and her heirs, forever as her separate estate as aforesaid, with the powers conferred upon her aforesaid.

CHARLES H. CLIFTON.

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me in my office and acknowledged and delivered by Charles H. Clifton, a party thereto, to be his act and deed, and that I have recorded it and this certificate in my said office.

Witness my hand this 23rd day of October, 1872.

CH. M. THRUSTON, *Clk*,
By S. F. HARLAN, *D. C.*

A copy.
Att.:

CH. M. THRUSTON, *Clk*,
By JOHN K. PAGE, *D. C.*

EXHIBIT D.

Exhibit D, referred to in the bill of complaint, is as follows:

This deed poll executed by Charles H. Clifton this first day of April, in the year eighteen hundred and seventy-three, and by him the same day delivered to the grantee, Nannie Williams McNairy Clifton,
21 wife of said Charles H. Clifton, witnesseth, that for and in consideration of the love and affection *to* the said Charles has for his said wife, the said Nannie, he doth hereby give, assign, and grant, and possession deliver to his said wife, the said Nannie, all that tract or parcel of land lying and situate in the city of Louisville, and State of Kentucky, and on the south side of Main street in said city, between Fifth and Sixth streets in said city, having twenty-six feet and three inches front on said Main street, running south the same width two hundred feet, more or less, to an alley, the same being the western quarter of the half acre lot No. 78, as designated on the plan of Louisville, being number 198 West Main street in said city, to hold to her the said Nannie, and her heirs, forever as her own separate estate, free from the control, use, and benefit of her husband and all others.

And the said Charles, for and in consideration of the love and affection he has for his said wife the said Nannie, doth hereby give, assign,

and grant, and possession deliver, to his said wife the said Nannie, all that tract or parcel of land lying and situate in the county of Jefferson, and State of Kentucky, on the western side of the Bardstown turnpike, and about a quarter of a mile from said turnpike, and principally opposite Monck's place on said turnpike, bounded on the eastern side
22 by the land of McBurnie's heirs or devisees or assignees, and by Daniel Doup's heirs or devisees or assignees, on the southern side by the lands of William Scrodt, subject to a right of way in favor of Bishop McCloskey, or the Catholic church, on the western side by the land of Bishop McCloskey, or the Catholic church, Casper Garloch, M. Agunver, and on the northern side by a lane running to said turnpike; the whole of said tract or parcel of land containing thirty-eight acres, more or less, to hold to her the said Nannie, and her heirs, forever as her own separate estate, free from the control, use, and benefit of her husband and all others.

And the said Charles doth hereby confer upon said Nannie, and invest her with power to appoint said tracts or parcels of land, and each or both of them, or part or parts of each or both, as often as she may choose to exercise the same, to such use as she may designate by joint deed with her husband; and he doth also confer upon her, the said Nannie, the power to appoint the said tracts or parcels of land, each or both of them, or any part or parts of each, or both, to such uses as she may designate by a writing in the form of, and to take effect as, a devise or devises under the statute of wills of Kentucky.

But it is provided, and is now so declared, that he, the said
23 Charles H. Clifton, doth reserve, retain, and hold the power to revoke the grants and each and both herein made, in whole or in parts, of each or both, and appoint to any uses, and to such person or persons as he may designate, either by deed, or writing in the form of and to take effect as a devise or devises under the statute of wills of Kentucky, and may cause such uses to spring or shift as he may declare.

But in default of appointment or appointments by him, and to the extent he may fail to appoint or declare or designate each of said tracts or parcels of land and all estate therein as such part or parts as have not been appointed or concerning which there has been no declaration of use or designation of person or persons in the form aforesaid under the power reserved to him, shall remain to her, the said Nannie, and her heirs, forever as her separate estate as aforesaid, with the power conferred upon her aforesaid, and the said Charles doth warrant to her, the said Nannie, the lands hereby granted and conveyed as against himself and all claiming under him.

In testimony whereof the said Charles H. Clifton doth hereunto affix his hand the day and year first above written.

CHARLES H. CLIFTON.

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing
24 deed was produced to me in my office, and acknowledged and delivered by Charles H. Clifton, a party thereto, to be his act and deed, and that I have recorded it and this certificate in my said office.

Witness my hand this 2nd day of April, 1873.

CH. M. THRUSTON, *Clk*,
By S. F. HARLAN, *D. C.*

A copy.
Att.:

CH. M. THRUSTON, *Clk*,
By JNO. K. PAGE, *D. C.*

Upon which bill of complaint there issued the following subpœna in chancery, to wit:

Subpœna in chancery.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby commanded to summon Charles H. Clifton and Nannie Williams McNairy Clifton to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court Hall, in the city of Louisville, on the first Monday in December next, to answer a bill in equity exhibited against them in our said court by Stephen E. Jones, assignee of Charles H. Clifton, bankrupt, which they shall in nowise omit, under the penalty of four hundred dollars; and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of
25 our said court hereto affixed, at the clerk's office of said court, in Louisville, this 25th day of October, A. D. 1876, and in the 101st year of our Independence.

Attest:

[L. S.]

SAM'L B. CRAIL,
C. C. C. K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 4th day of December next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN,
His Deputy.

Upon which subpœna the marshal made the following return, viz:

Marshal's return.

Executed October 30th, 1876, by delivering a copy of the within to each of the within named, Charles H. Clifton and Nannie Williams McNairy Clifton.

T. E. BURNS, *U. S. M.*,
By HENRY CRITTENDEN, *D. M.*

Appearance of def'ts.

And afterwards, to wit, on Monday, the 4th day of December, A. D. 1876, came the defendants, Charles H. Clifton and Nannie Williams McNairy Clifton, by Muir, Bijur & Davie, their counsel, and entered their appearance to the bill of complaint herein.

26 And afterwards, at the term of our said court held for its October term, 1876, to wit, on Tuesday, January 9th, A. D. 1877, came the defendants, by Muir, Bijur & Davie, their counsel, and filed their joint answer herein, which is as follows:

Answer.

In the circuit court of the United States for the sixth circuit and district of Kentucky, at Louisville.

STEPHEN E. JONES, ASSIGNEE, }
vs.
CHARLES H. CLIFTON, &c. }

The defendant', Charles H. Clifton and Nannie McNairy Clifton, for answer to the petition in equity of the complainant herein, says it is true that the said Charles made the two deeds of conveyance in the said bill described, and that the same were delivered and recorded as set out in said bill; but they deny that the property therein conveyed was a very large part in value of the estate of said Charles H. Clifton, or that the said property was then of the value of seventy-five thousand dollars, or any such sum; and they deny that the said instruments, or either of them, were or are null and void, or of no validity or effect, or that nothing passed by said deeds, or either of them, or that the said property therein described and mentioned was the property and estate of the said Charles after, as the same had been his property and estate
27 before, the making thereof, or continued to be his property, or under his dominion or control, or for his own use or benefit, down to the time of the adjudication in bankruptcy against said Charles, or of the assignment made to plaintiff, or that it remained the property of said Charles at any time after said conveyances.

They deny that the making or recording of the said two instruments, or either of them, was a contrivance or scheme on the part of said Charles H. Clifton to cheat, or hinder, or defraud his future creditors, or to evade the payment of any debt he might thereafter contract, or that it was a scheme or contrivance to accomplish such purposes by placing said title or conveying said title to said property in his wife, the defendant Nannie, beyond the reach of such creditors, at the same time reserving to himself the use, control, or dominion over it for his own benefit, or that the said conveyances were made for any such purpose or design.

They deny that the said conveyances were or are in effect an attempt on the part of said Charles to vest the title to said property in his wife, to be held by her in trust for his use or benefit, free from his debts, or that said instruments are for that, or for any reason, void or of no validity or effect.

28 They deny that the title to the said property passed to or vested in the complainant as assignee in bankruptcy of said Charles, or otherwise, or in virtue of the deed of assignment to said assignee, or otherwise, or that complainant is entitled to the possession of the same, to be administered by him as assets for the benefit of the creditors of said Charles, or otherwise.

They deny that the complainant has any title to said property whatever, or that the title and claim and possession of the defendant, Nannie, constitute or cast any cloud upon any title of complainant.

Wherefore they pray that the complainant's bill against them be dismissed, and that they recover of the complainant their costs herein expended, and they pray for all general relief.

MUIR, BIJUR & DAVIE,
Attorneys for Clifton.

The statements of this answer are true.

C. H. CLIFTON.

Subscribed and sworn to before me by C. H. Clifton on December 6th, 1877.

GEO. M. DAVIE, *N. P., J. C.*

29 And on another day of said term of our said court, to wit, on Monday, February 5th, 1877, came the complainant, by James A. Beattie, his counsel, and filed exceptions to the defendants' answer herein, which are as follows:

Exceptions to answer.

In the circuit court of the United States for the sixth circuit and district of Kentucky.

STEPHEN E. JONES, ASSIGNEE IN BANKRUPTCY of Charles H. Clifton, bankrupt,
versus
CHARLES H. CLIFTON AND WIFE.

Exceptions to answer.

The complainant, Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, bankrupt, excepts to the answer of Charles H. Clifton and Nannie Williams McNairy Clifton, respondents, to the bill of complaint herein, and assigns for cause of exception thereto that the said answer and the allegations thereof are wholly immaterial, irrelevant, and insufficient in law, and present no defence whatever to the said bill of complaint, and the relief prayed for therein.

And the complainant humbly prays that the said defendants may be compelled to put in a full and sufficient answer to the said bill.

B. H. BRISTOW AND
JAMES A. BEATTIE,
For Complainant.

James A. Beattie, of counsel for complainant, states that the above exceptions are put in bona fide and on points of law, which he believes to be well taken.

30 JAMES A. BEATTIE.

Stephen E. Jones, the complainant in the above-entitled cause, being duly sworn according to law, states that the foregoing exceptions are taken in good faith and not for the purpose of delay.

STEPHEN E. JONES.

Subscribed and sworn to before me by Stephen E. Jones this 5th day of February, A. D. 1877.

JAMES A. BEATTIE,
Com'r Cir. C't, U. S. Dist. Ky.

Order overruling exceptions.

And at another term of our said court, held for the February term, 1877, to wit, on Wednesday, May 23rd, 1877, came the complainant, by

James A. Beattie, his counsel, came also the defendants, by George M. Davie, their counsel.

The exceptions to the answer having been heard, it seems to the court that the equity is for the defendant.

It is therefore ordered, adjudged, and decreed that said exceptions be and the same are hereby overruled.

And afterwards, at another term of our said court, held for its October term, 1877, to wit, on Wednesday, October 24th, 1877, came the complainant, by James A. Beattie, his counsel, and filed his replication to the answer herein, which is as follows:

Replication.

31 In the circuit court of the United States for the district of Kentucky.

STEPHEN E. JONES, ASSIGNEE IN BANKRUPTCY of Charles H. Clifton, bankrupt,
vs.
CHARLES H. CLIFTON AND WIFE.

Replication.

The replication of Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, bankrupt, to the answer of Charles H. Clifton and Nannie Williams McNairy Clifton, his wife.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in this said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

BENJAMIN H. BRISTOW &
JAMES A. BEATTIE,
For Complainant.

And on another day of said term of our said court, to wit, on Thursday, October 25th, 1877, came the defendants, Charles H. Clifton
32 and wife, by G. M. Davie, their counsel, and filed their amended answer and two exhibits herein, which amended answer is as follows:

Amended answer.

Circuit court of the United States, sixth circuit, Kentucky district.

S. E. JONES, ASSIGNEE,
vs.
CHARLES H. CLIFTON AND NANNIE MCNAIRY Clifton.

Amended answer.

The defendants, Charles H. Clifton and Nannie McNairy Clifton, for

further and amended answer herein, state that at the times the two deeds set forth in the complainant's bill herein, were executed and recorded, the said Charles H. Clifton was the owner and possessed of a large estate, consisting of realty and personalty, in the city of Louisville, and in the State of Kentucky and elsewhere, of which the property in the said deeds conveyed was but a comparatively small proportion, and that he then owed few debts, and those were of comparatively, and, in fact, inconsiderable amounts, and he was entirely solvent and promptly met and paid all claims and obligations against him, and that no debt then due by him now exists, nor did any such exist at the date of his petition in bankruptcy, nor for a long time prior thereto.

These defendants intermarried on the 1st day of March, 1870, and
33 at the time of the making of said deed they had two infant children and have since had two others.

Both of the defendants had been reared and accustomed to the comforts and mode of life of the highest and wealthiest classes of social life, and to large expectations of hereditary wealth, and neither had been educated or trained to any profession or business, nor had either ever engaged in any business or had any business experience or qualifications, but both were totally dependant, and would be totally dependent upon the estate of respondent, Charles H. Clifton, for their future maintenance and support, and for the maintenance and support of their children then living and such others as might be born to them.

The respondent, Charles H. Clifton had, before his marriage, taken out three of the policies of insurance described in the bill herein, intending that they should be for the benefit of his wife and children, if he should marry; and after his marriage with respondent Nannie, he took out the other two policies in the bill described, intending them also to be for her and their children's benefit, but through carelessness, or lack of knowledge, he took them out payable to himself.

Upon learning and considering afterwards that the said policies so payable were unsafe for his wife and children, and might be
34 subject to his debts in case of misfortune, he determined to so arrange said policies as to conform to his original intention with respect to them, and for that purpose consulted his counsel as to the proper mode to do so, and his counsel drew up the said first-named deed, dated October 23rd, 1872, and advised him that the said deed was the proper mode to carry out said intent, and to settle said policies on his wife in such manner as not to be liable to his debts or control, and he according' executed and recorded the same with the consent and approval of his wife, the respondent Nannie. His counsel further advised him that the said deed should be put to record for greater safety and certainty, and that in order to make the same a recordable instrument it would be necessary to convey some real estate therein; and, with that idea, and because he was willing to settle the same on his wife, the small lot of land on Buchanan street, worth not more than $750.00, was inserted in said deed.

At and after the time of respondent Charles' bankruptcy, the respondents were unable to pay the premiums on said policies so as to keep the same up, and were therefore compelled, in order to prevent the forfeiture of the same, to surrender said policies to the companies that had issued them and to take out in their stead paid-up policies, which said paid-up policies were taken out in the following companies at the following dates:

35	Ætna Life-Ins. Co., January 8th, 1877	$1,517 00
	Ætna Life-Ins. Co., Nov. 20th, 1875	$2,686 00
Connecticut Mutual Life-Ins. Co., April 13, 1876		$4,000 00
" " " " " Dec. 16, 1876		$3,613 00
Mutual Benefit Ins. Co., , 1876		$3,000 00
Total		$14,816 00

Amounting in all to the said sum of $14,816.00; for which amount said Nannie now holds said paid up policies, payable to her, and she holds none other.

Several months after said settlement of said policies of insurance on his wife, the respondent Charles, in response to many requests and solicitations from and promises to his wife, the said Nannie, and feeling it to be right and his duty to his wife and children in view of his lack of business experience and resources, and in view of their dependent condition, and in view of his then owning a large estate and having no debts of consequence, and being thoroughly solvent, and having no business obligations existing or prospective to prevent it, consented to make a proper and suitable provision out of his estate for their protection against any misfortune that might befall them or him.

With these motives, and in pursuance of this purpose, he consulted his counsel as to whether it was lawful and proper, and as to the proper mode of accomplishing it, laying before his counsel a full and fair statement of all his affairs and his motives, and was by his counsel
36 advised that it was lawful and proper that he should make the settlement proposed, and his counsel prepared the second deed, dated April 1st, 1873, as the proper mode of settling upon said Nannie and the children the said store-house on Main street, and the tract of land in Jefferson County, where the respondents then contemplated residing, and have ever since resided, and which was the ancestral home of the respondent Charles; and the respondent Charles thereupon executed and delivered and put to record said deed of settlement on April 1st and 2nd, 1873, and the said Nannie took possession thereunder and has ever since possessed, claimed, and owned the said property therein conveyed.

The said store-house on Main street was, at the time of said settlement, covered by a mortgage to Geo. P. Bissell for $15,000.00, for which it was ample security, and it was the expectation of respondent Charles to pay off the said mortgage at maturity, and leave the property clear of incumbrance, as a part of the settlement, but his subsequent insolvency before the maturity thereof prevented him from being able to do so. Said mortgage, with the unpaid interest therein, and the unpaid back taxes thereon, and a mortgage thereon made just previous to his bankruptcy to secure counsel fees therein of $1,000.00, amount, with the great depreciation of property, especially on Main street, in the last three years, to the full value of said property, and respondent Nannie
37 will derive no benefit therefrom, and the settlement upon her by said deed of April 1st, 1873, amounted practically therefore on to the settlement of the home in the county of thirty-five acres on her.

At the time of making said settlement neither of the respondents had, nor have they ever had, any idea of defrauding any creditors, but, on the contrary, the desire of respondents was to make a prudent and proper settlement; and said settlement was openly and publicly made and recorded when, as to the policies of insurance, such public recording was not even necessary.

Said settlement was not made with any idea or thought of respondent's going into business, or to evade any existing or contemplated obligations, and the same was much less than a full and proper proportion of respondent Charles' estate, for such settlement, under their circumstances at the time. The said Nannie had not, nor has she, any property or expectations of any kind except said property so settled on her, and is wholly dependent thereon for the future maintenance and education of her children, and the said settlement is not sufficient for that purpose.

The said deeds of settlement are herewith filed as parts hereof, marked 1 and 2.

These respondents deny that there was ever intended to be, or that there ever was or is, any power retained in said deeds, to Charles, to annul or revoke the said settlement in such manner as to place the title to
38 said property back in himself, or for his own benefit; but, on the contrary, the sole and only purpose and intent of said settlement was to settle the same upon said Nannie, and upon her heirs, forever, "as her own, separate, free from the control, use, and benefit of her husband and all others;" and the respondents, when said deeds were executed, intended and understood the said power to be a power in respondent Charles to appoint the said estate to uses of his children in case any emergency should arise that should make it necessary for their interests that such appointment should be made; and the respondent Charles has never exercised or claimed any such power of recalling said property to himself, and disclaims any such intention or right, and says that he intended by said settlement to avoid and provide against said property ever being applied to the benefit or subject to the liabilities of any one, except his said wife and children, and if the said deeds provide in any other manner, it was through mistake and oversight in the drafting of the same; and the respondents pray that the court will confirm the same as intended to be made, making such corrections in the same as may be necessary therefor, if any be necessary.

The respondents, having fully answered, pray to be hence dismissed with their costs, and pray for all general and equitable relief.

MUIR, BIJUR & DAVIE,
For Respondents.

39 The statements of this answer are true.

C. H. CLIFTON.

Subscribed and sworn to before me by Charles H. Clifton this June , 1877.

GEO. M. DAVIE.
Notary Public, Jeff. Co., Ky.

The exhibits 1 and 2, above referred to, are not here copied, as they are the same as exhibits C and D heretofore copied in this record.

And afterwards, on Monday, December 3rd, 1877, came the complainant, by his counsel, and filed his replication to the amended answer herein, which is as follows:

Replication.

In the circuit court of the United States for the district of Kentucky.

STEPHEN E. JONES, ASSIGNEE OF CHARLES H. Clifton, bankrupt,
vs.
CHARLES H. CLIFTON & WIFE.

Replication.

The replication of Stephen E. Jones, assignee of Charles H. Clifton, bankrupt, to the amended answer of Charles H. Clifton and Nannie Williams McNairy Clifton, his wife, defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said amended answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to
40 be answered unto, and that the said amended answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

B. H. BRISTOW AND
JAMES A. BEATTIE,
Solicitors for Complainant.

And at another term of our said court, held for its June term, 1878, to wit, on Wednesday, June 5th, 1878, came the complainant, by Bristow & Beattie, his counsel, came also the defendants, by Bijur & Davie, their counsel.

The complainant, by his counsel, filed his exceptions to the deposition of the defendant Charles H. Clifton.

Said exceptions were argued by counsel, and the court, not being advised, takes time.

The exceptions above referred to are as follows:

Exceptions to Clifton's depo'ns.

United States circuit court, district of Kentucky.

STEPHEN E. JONES, ASSIGNEE OF CHARLES H. Clifton, bankrupt,
vs.
CHARLES H. CLIFTON & WIFE.

Exceptions.

The complainant excepts to the deposition of Charles H. Clif
41 ton, given in this cause, because the said Clifton is not a competent witness for his wife, the respondent Nannie Clifton.

B. H. BRISTOW AND
JAMES A. BEATTIE.
For Compl't.

Order overruling exceptions to depo'n of Clifton.

And on another day of said term of our said court, to wit, on Thursday, June 6th, 1878, came again the parties by their counsel.

The court being now fully advised of the exceptions of the complainant to the deposition of Charles H. Clifton, it is now decreed and ordered that said exceptions be, and the same are hereby, overruled.

Thereupon the evidence and arguments of counsel were heard, and the court, not being advised of the decree which it is proper to render herein, takes time.

Decree.

And on another day of said term of our said court, to wit, Friday, July 12th, 1878, this cause having been heard and argued by counsel, and thereupon, upon consideration, thereof, it is ordered, adjudged, and decreed that the complainant's bill of complaint be, and the same is hereby, dismissed.

It is further ordered, adjudged, and decreed that the defendants, Charles H. Clifton and Nannie Williams McNairy Clifton, recover of the complainant, Stephen E. Jones, their costs herein expended.

Appeal.

Thereupon came the complainant, by James A. Beattie and B. H. Bristow, his counsel, and prays an appeal to the Supreme Court
42 of the United States, which is granted by the court.

The following are the depositions read upon the hearing, viz:

Charles H. Clifton's depo'n.

CHARLES H. CLIFTON, being duly sworn, and examined by Mr. VIE, of counsel for defendants, deposed as follows:

Int. 1. State your name, age, residence, and occupation.

Ans. Charles H. Clifton; residence, Jefferson County; occupation, I suppose I am as much of a farmer as anything else. I have no regular occupation. I was thirty-two years of age on 16th of last December.

Int. 2. You are the defendant, Charles H. Clifton, in this case?

Ans. Yes, sir.

Int. 3. State when you intermarried with the defendant, Nanette Mary Clifton.

Ans. On March 1st, 1870.

Int. 4. What was the condition of your estate at the time of your marriage?

Ans. I was worth from $300,000 to $350,000 when I was married.

Int. 5. In what did your estate consist?

Ans. Real estate, bonds, stocks, cash, and some few choses in action—notes due me.

Int. 6. State under what circumstances and for what reasons you made the deed of trust to your wife of October 23d, 1872, whereby you conveyed to her certain policies of insurance and a lot of land.

43 Ans. Well, I had insured my life several years before I was married for the benefit of my wife, if I should ever have one, and children. Of course it would be of no benefit to me otherwise. Just

before I had transferred these policies to my wife, Julius Dorn had died, and I noticed that they had gotten on his policy of insurance; there was some trouble over it, I don't know how, and I thought that these policies of mine should be secured to my wife, as they were really taken out for her benefit, and I wanted her to get them, and no one else. And as for the piece of property that was deeded with the insurance policies, I put in the smallest piece I could find, as my lawyer told me I would have to have a piece of property put with. I looked over my property and found that this was the smallest piece I had undivided.

Int. 7. Who was your lawyer in said transaction?

Ans. Col. Wooley.

Int. 8. What property had you at the time you made that settlement on your wife of the policies of insurance and the small lot of land, of which you have spoken, in October, 1872?

Ans. I had over $265,000 worth of property at the time.

Int. 9. In what did it consist?

Ans. Real estate, bonds, and stock; principally bonds.

Int. 10. You say that at the time of your marriage, in 1870, you were worth from $300,000 to $350,000, and at the time you made this settlement, $265,000. What was the cause of the difference in value of
44 your estate between these two periods?

Ans. Well, I suppose it had shrunk somewhat, but principally it was my spending the bulk of it.

Int. 11. In what way did you spend it?

Ans. Well, I regret to say it, but my life was not a very good one from the time I was married, nor even before. I drank a good deal and was fond of cards, and in that way I got rid of it. Before my marriage and afterwards I done that way.

Int. 12. Where were you between the time you were married and 1872?

Ans. I was in Europe for the first nine months after I was married.

Int. 13. What were your expenses while in Europe?

Ans. I suppose I spent in the nine months $20,000.

Int. 14. Did you or not, at the time you made that settlement, anticipate becoming insolvent?

Ans. I did not anticipate it. I had no idea of such a thing.

Int. 15. Were you, or not, anticipating going into business at that time?

Ans. No, not in any special business. I thought I had sufficient to live on all my life, and live happily and comfortably.

Int. 16. Have you got a list of your property as well as you can now give it, which you had in October, 1872, when you made the first settlement on your wife?

Ans. Yes, sir.

45 Int. 17. Please file it as part of your deposition.

Ans. I file it, and mark it Exhibit 1.

Exhibit 1 above referred to is as follows:

List of property owned by C. H. Clifton in 1872.

Property on East Main street, including pork-house and tobacco factory	$55,000 00
Trust property, J. B. Slaughter, trustee	25,000 00
Lot on Washington bet. Buchanan & Wenzel sts	15,000 00
Cottage on Buchanan street	750 00
" " alley bet. Buchanan & Franklin	600 00

117 ft. on Franklin st	2,300 00
26¼ ft. Main bet. 5th & 6th sts	35,000 00
420 ft. " " 24th & 25th sts	16,800 00
50 ft. " and 23rd sts	2,250 00
50 ft. 4th & Kentucky	8,750 00
100 ft. 4th bet. St. Catharine & Oak	9,000 00
Bet. 90 & 100 acres, county	3,200 00
Homestead in county	18,000 00
Int. in distillery property	500 00
Land in Bullitt County	9,000 00
640 acres in Wisconsin	7,500 00
640 " " Kansas	6,400 00
Securities, bonds, &c	50,000 00
	265,050 00

Int. 18. Is that list correct, and are these values affixed to the property the fair values of the property at that time?

Ans. To the best of my judgment. If anything, they are really less than the value of them—the values of the different securities.

46 Int. 19. What have become of these policies of insurance at this time?

Ans. I had to release them. After my failure I could not carry them on and I had them cancelled.

Int. 20. State for what reasons and under what circumstances you made the deed of settlement of April 1st, 1873, upon your wife.

Ans. Well, I did it through kindly feeling for my wife and to please her, more to please her than anything else. She was pressing and persuading me to do it. And another reason was her idea that she held out to me was that our children would have enough after deeding the property—one of them had died just before I made the deed—when I was hanging fire. I thought myself that I had plenty, and did not think I ought to give them anything, but she kept on begging me, and I gave it to her on that ground more than anything else. Both of my children that I had at that time died before I could move to the place after giving it to her. She insisted on going to the country, thinking it would save their lives, but after getting there they both died—after giving it to her.

Int. 21. For what had the place been used before that time?

Ans. It had been in my family for years, and my grandfather was living on it then. I was supporting him. And that was another reason I went there, so as to take him home and take care of him, as well as for the benefit of my children.

47 Int. 22. What property had you at that time, and in what did it consist?

Ans. I had property that I valued then at from $245,000 to $250,000. It consisted of real estate, bonds, stocks, and notes.

Int. 23. Have you a list of such property? If so, file it.

Ans. I have. I file the same and mark it Exhibit 2.

Exhibit 2 above referred to is as follows:

List of property owned by C. H. Clifton April 1st, 1873.

Property on East Main st., including pork-house and tobacco factory	$55,000 0
Trust property, J. B. Slaughter, trustee	25,000 0

Lot on Washington bet. Buchanan & Franklin sts	15,000 00
Cottage on alley bet. Washington & Franklin	600 00
117 ft. on Franklin	2,300 00
26¼ ft. Main bet. 5th & 6th sts	35,000 00
420 ft. " " 24th & 25th sts	16,800 00
50 " " & 23rd sts	2,250 00
100 ft. bet. St. Catharine & Oak	9,000 00
Bet. 90 & 100 acres, county	3,200 00
Homestead in county	18,000 00
Int. in distillery property	500 00
Land in Bullitt County	9,000 00
640 acres in Wisconsin	7,500 00
" " " Kansas	6,400 00
Bonds, stocks, &c	40,000 00
	245,550 00

Int. 24. State whether or not the values of the property in that list were correct valuations of the property at that time.

Ans. I think so.

48 Int. 25. Had you or not at that time any fear or contemplation of insolvency?

Ans. I had none in the world.

Int. 26. Were you, or not, contemplating or expecting to go into business at that time?

Ans. I was at that time in the Traders' Bank, more to take care of what I had in it than anything else, but I contemplated going in no regular business in Louisville at that time.

Int. 27. Where have you been living since that settlement?

Ans. I have been living in the country ever since, with the exception of three or four months.

Int. 28. Upon what property?

Ans. Upon the homestead that I gave my wife.

Int. 29. What was the value of the small lot of land which you included in the insurance policies in the first deed of settlement?

Ans. About $750.

Int. 30. What was the value of the thirty-five acres in the country which you conveyed to your wife by the second deed of settlement?

Ans. About $18,000. I valued it at five hundred dollars an acre, as property adjoining me outside of the city had sold for five hundred dollars an acre. I put mine at that figure also, although it was further out in the country; I valued it at a higher price.

Int. 31. What became of the property which you had on April 1st, 1873, and which is included in the list Exhibit 2? State the time and the parties to whom it was sold, and the amounts.

49 I have a list here, which will answer that question. I file it, and mark it Exhibit 3. That list is complete except the property which the assignee in bankruptcy sold after my bankruptcy.

Exhibit 3, above referred to, is as follows:

List of my sales of real estate.

Sold to—	Description of property.	Date.	Consideration.	Value in Octo., '72, & Ap'l, '73
John W. Kearney....	50 ft., cor. 4th & Kentucky sts.....	Octo. 24, 1872	$8,750 00	$8,750 00
Rob. Dunlop.....	50 ft., cor. 23rd & 120 ft. bet. 24th & 25th.	June 10, 1873	7,042 00	7,042 00
Lawrence Schang....	30 ft.. bet. 24th & 25th on Main..	June 10, 1873	1,050 00	1,050 00
Clarkson mortgage, benefit of J. Hornsby.	Property on Washington st. bet. Wenzel & Buchanan st.	March 5, 1874	*6,000 00	15,000 00
R. S. Philpot.....	30 ft., cor. 24th & Main sts	Apr. 25, 1874	1,050 00	1,050 00
J. B. Slaughter.....	240 ft., Main bet. 24th & 25th str.....	May 5, 1874	9,600 00	9,600 00
Geo. C. Buchanan....	100 ft., 4th bet. St. C & Oak sts	" 31, 1875	8,500 00	9,000 00
John S. Cain & Geo. P. Doern.	93 acres in county.....	Sept. 11, 1875	958 97	3,200 00
Different parties.....	640 acres in Wisconsin.....	Various times	7,500 00	7,500 00
	Land in Bullitt Co	....	9,000 00	9,000 00
H. A. Thierman.....	¼ int. in distillery property.....	.....	450 00	500 00

* Sold after bankruptcy for $1,706.75.

50 Int. 32. Does that list show correctly the date of sale, the consideration which you received, and the value of the property sold by you?

Ans. As near as I could get it; yes, sir.

Int. 33. You say that this does not include the property which your assignee in bankruptcy sold?

Ans. There is but one piece, and that is the piece put down as the Clarkson mortgage for the benefit of Hornsby. That was sold by the assignee in bankruptcy.

Int. 34. Have you or not a list of the property sold by your assignee and its value, and the amounts it sold for, and the times it was sold? If so, file it as part of your deposition.

Ans. I will file such a list and mark it Exhibit 4.

Exhibit 4, above referred to, is as follows:

51

Purchaser.	Description of property.	Amount of mortgage.	Date of mortgage.	When sold.	Amount it sold for at assignee's sale.	Its value in April, 1873.
Isham H. Hornsby under Clarkson mortgage..	146 12/12 feet, corner Washington and Buchanan streets.	$6,000 00	March 5, 1874	Feb'y 11, 1876	$4,706 75/100	$15,000 00
S. Ullman.....	303½ feet, corner Main and Buchanan streets.	$1,981 85/100	June 1, 1875	May 25, 1876	$21,375	$55,000 00
Mary Flowers...	Lot on alley between Washington & Buchanan, Wenzel, and Franklin streets.	No mortgage	.....	.....	$350 00	$600 00
Mississippi Valley Life Ins. Co.	117 feet, south side of Franklin near Buchanan street.	No mortgage	.....	May 25, 1876	$1,000	$2,300 00
Not sold	640 acres of land in Kansas.	No mortgage	.....	Not sold.....	.....	$6,400 00

52 Int. 35. State whether or not at the time you made the first settlement on your wife in October, 1872, you had any debts. If so, how much and to whom did you owe it.

Ans. Well, if I had any debts they amounted to nothing. There may have been grocery bills, or bills of that kind, that I could have paid in a few minutes. I had money at the time in bank, and could get money at any time. I did not consider that I owed anything.

Int. 36. State whether or not, on or about 1st April, 1873, when

you made the settlement of the country place on your wife, you were in debt. If so, to whom and how much.

Ans. I do not know that I was in debt at all, of any consequence, except as in my last answer. I may have had two or three little bills. I had never been to protest; my credit was good, and I could have gotten money at any time, although I did not use my credit to any extent in bank. I always had plenty at that time.

Int. 37. What sort of income had you at that time?

Ans. A very handsome income; my property was all renting well.

Int. 38. Had you or not money in bank, or were you in debt?

Ans. I was not behindhand. I owed nothing that I could not pay at any moment then. I had bonds and things I could have sold
53 and paid them.

Int. 39. When was the first time you sold any property of yours?

Ans. The first piece was to Kearney.

Int. 40. That is on the list marked Exhibit 4?

Ans. Yes, sir; I sold it because I made a handsome profit on it, ver nearly one hundred per cent. in a year. I had no use for it, and I saw a good chance to make a good profit on it. I suppose it was the highest price property ever sold for in Louisville—$175 a foot—on Fourth street.

Int. 41. What led you to sell the property to Robert Dunlop, June 10th, 1873, and the property you sold to Lawrence Schang, on June 10th, 1873?

A. It was vacant property, yielding no income, and I had to pay taxes on it, so I concluded I would sell it and reinvest the money. I bought the property on a speculation for $20 a foot and sold it at $40, one portion at $35, and I would not sell any more at that price.

Int. 42. Did you make either or any of these sales under pressure for raising money?

Ans. No; I did not.

Int. 43. What were your expectations, and what were the expectations of your wife, with regard to your respective financial conditions at the time of these settlements?

Ans. Well, I considered myself rich, and she considered me rich. Both considered ourselves well off. I had no necessity for work-
54 ing, or to do anything in the world. I had enough, and I thought I had plenty to throw away, which I did all the time.

Int. 44. What is the present condition of yourself and your wife, financially?

Ans. We have a roof to cover our heads, and that is all.

Int. 45. Have you any other property beside the property in the country embraced by the trust-deed, and the $700-lot of land?

Ans. Nothing; we have not a dollar in the world. Since that time, since I turned my estate over, I have got along the best way I could without anything.

Int. 46. Has your wife any property, or expectations of property, or have you any property or expectations of property from any source?

Ans. I have none, and I do not think she has any. She has some rich relatives, but I do not suppose they are going to leave her anything. She has no expectations. I have some rich relatives, but I do not expect them to leave me anything. Our relations are very distant on both sides.

Int. 47. Have you or not ever had any business experience, or had you ever had any at the time you made this settlement?

Ans. No. I had not any business experience at all; I did not know anything at all of business when I was in the bank.

Int. 48. You have stated that with regard to the first deed you made, namely, the one embracing the policies of insurance, that you
55 were advised to put in a piece of land. State exactly what that advice was.

Ans. He told me that in order to make a settlement of that kind, to endorse these policies over to my wife, that it was absolutely necessary to put a piece of land in with it in order to put the deed to record; otherwise it could not be recorded. He told me a deed to personal property could not be recorded, or something—I do not know why—that is what he told me—that I would have to put a piece of property in with it. I thought over it, and put in the smallest piece of property I could find; that is, an undivided piece. I could have divided a tract of land and given a foot, but I did not want to do that, and that was the smallest undivided piece I could find.

Int. 49. Then the small lot of land was put in to make it recordable, by advice of your lawyer, your intention being to settle the policies of insurance on your wife at the time.

Ans. That is all. My idea was, when I first took the policies out, for that purpose. In fact, the agents proposed it to me on that ground; said that some time I would to marry, and I would want it; and I took it out for the benefit of my family—if I should ever get married—though their names were not embraced in the policies, as I was not married, and I had neglected having it changed up to the time of Jul. Dorn's death. That was what made me do it.

Int. 50. Did your losses, by which your property was reduced,
56 occur after or before these settlements which you made?

Ans. They occurred after these settlements were made.

Int. 51. When did you first become aware that you were in financial troubles?

Ans. Well, I thought I was able to pay every debt I owed and have something left, within ten days before I went into bankruptcy.

Int. 52. State under what circumstances, and how you first discovered your condition.

Ans. Well, I went to your office (Muir, Bijur & Davie) to see you and Mr. Bijur and Mr. Muir about fighting an alley claim that was brought against me. I thought I had some grounds to beat it off, and you (Mr. Bijur) asked me, "Are you not trying to put it off?" I told you I could pay it. Mr. Bijur then said, "I believe you are broken." I laughed at him. He said, "Suppose you come in some time and give me a list of what you owe and what property you have, and everything, and I will examine it" I gave him the list, and looking at it, he said, "If they all force you, you are broken"; and he convinced me that I was really broken. That is the reason I took the step. Up to that time I thought I was solvent.

Int. 53. What was your condition in regard to money matters? Were you tight or easy during the years 1873 and 1874?

Ans. Money was easy with me then.

Int. 54. Did you engage in any business during that time on any account, or create any business debts?

Ans. No.

57 Int. 55. In the deeds from you to your wife it is alleged that there are powers of revocation. State what you know about that, and under what circumstances they were inserted. What was your intention and idea in making the deed?

Ans. In making these deeds with the power of revocation, my idea was simply this: I had given my wife this property, and my idea was, I wanted to go away from Louisville to live. I had come to the conclusion to go to California, to San Francisco, where I have a number of relatives; and in case I did go, without going through the trouble of a suit, to sell this property and reinvest it there, knowing that the property would not be of any account; that my wife could take the money and reinvest it there for the benefit of herself and her children.

Int. 56. Did or not you authorize your counsel or advise him to make such a settlement that you could set it aside in your own favor at any time?

Ans. No; I did not want that at all. I wanted it for the benefit of my wife and children.

Int. 57. What was your understanding of the deed in that particular at the time you signed it?

Ans. I understood it was giving it to her.

Int. 58. Had you ever received any legal education, or were you familiar with law terms at the time you signed the deed?

58 Ans. I had no idea of law terms. I did not know the first thing about law.

Int. 59. Did you dictate the terms of that deed; or by whom were they prepared?

Ans. They were prepared by my lawyer, Col. Wooley. I did not dictate the terms of the deed. I wanted *of* a deed of settlement made on my wife. I remarked to him that I thought of going away from Louisville, and that I wanted it placed in the most convenient way so that I could shift it to California and reinvest it there, if I went there, without going through a long chancery suit to have it sold.

Int. 60. What was your idea of going to California?

Ans. I had a great number of relations living there, and I imagined I might go out there and invest what I had in California, and my children would be all well off. I had received letters from my relatives asking me to come out there. In fact, all my relatives lived in California, and they were all people of prominence and rich.

Int. 61. Are any of your immediate family living?

Ans. I have no relatives living nearer than cousins, grandfather, and uncle.

Int. 62. At the time you made this contract with your wife, did you or not consider that it would cripple you or your estate in any manner?

59 Ans. No; I did not think it would under any circumstances; and, in fact, I know it did not cripple my estate.

Int. 63. From your idea of said deed did you or not consider that you had any right, or did you claim any right at any time, to take the property back to yourself?

Ans. No; I had no idea of having it come back to me for any use of my own in the world. I never intended that; and even if I thought it would assist me in business, I would not revoke it, if I could sell the property to-morrow for my own use.

(Counsel for complainant excepts to the whole of the foregoing deposition on the ground that the witness is incompetent to testify in this action, and he excepts to each and every one of the questions in said deposition and the answers thereto because they are incompetent, irrelevant and illegal. Reserving these exceptions, counsel for complainant cross examines the witness as follows:)

Cr.-int. 1. What sort of dwelling-house have you on the thirty-five acres of ground in the country?

Ans. A very nice dwelling-house.

Cr.-int. 2. Did you build it?

Ans. Yes, sir.

Cr.-int. 3. What did it cost?

Ans. The dwelling-house cost—I think my contract price was $8,500.

Cr.-int. 4. When was that house built? Before or after the deed made to your wife?

60 Ans. After.

Cr.-int. 5. The land you speak of as selling at $500 an acre, between you' place and the city, was that land improved?

Ans. There was a small house on it that amounts to nothing.

Cr.-int. 6. What became of the policies of insurance named in the first deed spoken of?

Ans. They were canceled. I was unable to pay them.

Cr. int. 7. Were they not commuted into other policies?

Ans. Oh, they were prorated terribly.

Cr.-int. 8. For what amounts were the new policies issued?

Ans. $14,700 or $14,800.

Cr.-int. 9. Where are these policies now?

Ans. I think they are all at home except one.

Cr.-int. 10. What became of that one?

Ans. My wife sold it for about $140, I think.

Cr.-int. 11. Had Julius Dorn died previons to the making of these two deeds?

Ans. Yes, sir.

Cr.-int. 12. What connection had he with the Traders' Bank and Warehouse Company?

Ans. He was cashier.

Cr.-int. 13. Did not that banking company prove insolvent immediately upon his death?

Ans. Well, I suppose it has proved so since then. I bought stock about the time of his death. I took it. Whether it was before
61 or just after his death, I don't remember, but I bought stock about that time, and paid for it ten cents on the dollar. I thought it was solvent, and would return the stockholders something.

Cr.-int. 14. Had you been interested in the bank before his death?

Ans. I had some stock.

Cr.-int. 15. How much had you?

Ans. Originally, I bought $5,000 worth of stock—that is, full-paid stock; and at different other times I bought a little stock.

Cr.-int. 16. In the Traders' Bank?

Ans. Yes, sir.

Cr.-int. 17. Were you one of the directors of the bank?

Ans. I was; yes, sir.

Cr.-int. 18. At the time you made these deeds, were you not being sued largely in the courts in Louisville?

Ans. No; I was not being sued largely. I do not think this bank suit had been brought then. No; I was not being sued. I do not think there had ever been a suit brought against me.

Cr.-int. 19. You became bound as surety for J. C. and William Johnstone, and for Julius Dorn, in large sums of money?

Ans. No; not in large sums. I was bound to some extent. Most of the debt had been paid off, and has since all been paid.

Cr.-int. 20. Did you know George Nuerenberger?

62 Ans. I knew him casually. I had been introduced to him; that is about all.

Cr.-int. 21. Were you not indebted on his account, or in connection with him, or in connection with Julius Dorn, in his business transactions with Nuerenberger?

Ans. I never was indebted to Nuerenberger in the world that I know of in any way. The only way I was ever indebted for Julius Dorn was $1,500, on Nuerenberger, the Johnstones, Dorn, and myself. It was all paid; it fell to my lot to pay $5,000 of it.

Cr.-int. 22. After the making of these deeds were many suits brought in the courts here against you, and for considerable sums of money?

Ans. How long afterwards?

Cr.-int. 23. Any time afterwards.

Ans. At the time I went into bankruptcy of course there were suits against me.

Cr.-int. 24. How long before that had these suits been brought?

Ans. Before I went into bankruptcy?

Cr.-int. 25. Yes, sir. When did the first suit commence against you?

Ans. That would be a pretty hard thing to tell. I could not tell the exact date. I suppose in the fall of 1874 suits began to be brought against me.

Cr.-int. 26. When did the liabilities on these notes arise on the debts you were sued for at the time of which you speak?

63 Ans. I do not understand your question. What debts do you mean? I was not sued for some time after making my deed, I know.

Cr.-int. 27. Do you recollect the date of the first suit that was brought against you?

Ans. No; I do not remember. I can find out by going over to the court-house.

Cr.-int. 28. When did you file your petition in bankruptcy?

Ans. December 4th, 1875; I think it was December, 1875.

Cr.-int. 29. Were you engaged in any business between October 23rd, 1872, and December, 1875?

Ans. I have never been engaged in any business at all, except the connection I had with the Traders' Bank. This is the only business I have ever had—commercial business.

Cr.-int. 30. You say in that period you got rid of property valued at $265,000. How did you get rid of it?

Ans. I did not get rid of it. A great deal of it I turned over to my assignee. All of it has not been sold yet. Besides, I spent a great deal of it in high living, drinking, playing cards, and depreciation in value of real estate—rents depreciating. It gradually ate itself up, and dwindled away as it will with a man being careless and not taking care of it. Then I lost by indorsing for Johnstone.

Redirect examination by Mr. DAVIE, counsel for defendant:

64 Int. 1. Had you or not at the time you made the deed of April 1st, 1873, signed any of the paper upon which you were afterwards sued?

Ans. I cannot state that positively. None that I know of. I considered myself perfectly solvent and rich when I made the deed, and I would be to-day, except for the depreciation in value of real estate. After paying everything and spending tremendous amount of money I did I would still have been rich if it had not been for the great depreciation in value of real estate.

Clerk's certificate.

DISTRICT OF KENTUCKY:

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do certify that the foregoing sixty-nine pages, this included, contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Louisville, this 3rd day of December, A. D. 1878.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

(Indorsement on cover:) No. 695. Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, appellant, vs. Charles H. Clifton & Nannie W. McN. Clifton. Kentucky C. C. U. S. Filed 20th December, 1878.

Supreme Court of the United States.

OCTOBER TERM, 1879.

STEPHEN E. JONES, Assignee in Bankruptcy of Chas. H. Clifton, Appellant.

VERSUS } *No. 695.*

CHARLES H. CLIFTON and NANNIE W. McN. CLIFTON, - - - Appellees.

B. H. BRISTOW,
JAMES A. BEATTIE, } Counsel for Appellant.

BRIEF FOR APPELLANT.

Supreme Court of the United States

OCTOBER TERM, 1879.

STEPHEN E. JONES, Assignee in Bankruptcy of Chas. H. Clifton, - - - - - - - Appellant,

VERSUS } No. 695.

CHARLES H. CLIFTON and NANNIE W. McN. CLIFTON, Appellees.

STATEMENT OF THE CASE.

In October, 1876, the appellant brought this suit in equity in the Circuit Court for the district of Kentucky, attacking the validity of two deeds made by the bankrupt, the appellee Charles H. Clifton, directly to his wife, the other appellee, and seeking a decree declaring them to be invalid, and that the property purporting to be conveyed thereby had vested in and should be surrendered to the appellant. The appellees filed an answer and amended answer, to which the appellant duly replied. The only testimony taken in the case was in two depositions for the appellees, one of which was that of Clifton himself. On the hearing a decree was entered dismissing the bill with costs, and thereupon an appeal was immediately prayed and allowed in open court.

The deeds in question were made October 23, 1872, and April 1, 1873, respectively, and were duly acknowledged and recorded

in the proper office. Each begins, "This deed poll," and purports to be made in consideration of "love and affection," and to convey to Mrs. Clifton the property therein described as her separate estate, free from the control of her husband. Both of the deeds, however, reserve, in substantially the same language, to Clifton a general power of revocation and a general power to appoint the uses of the property by deed or will, as he may see fit. In the deed of April 1, 1873, which in this respect is the fuller and more precise of the two, the words are, "But it is provided, and is now so declared, that he, the said Charles H. Clifton, doth reserve, retain, and hold the power to revoke the grants, and each and both herein made, in whole or in part, of each or both, and appoint to any uses, and to such person or persons as he may designate, either by deed or writing in the form of and to take effect as a devise or devises under the statute of wills of Kentucky, and may cause such uses to spring or shift as he may declare."

The property covered by the deeds consisted of a lot of land on Buchanan and one on Main Street in Louisville; of five policies of life insurance for $10,000 each; and of a tract of land and improvements in Jefferson County, Kentucky, worth, so far as appears in evidence, at the time this suit was instituted, the first lot, $750; the second lot, nothing beyond incumbrances; the policies—they had been commuted—$14,800; and the country-land and improvements, $26,500, aggregating $42,050, but alleged in the bill to have been worth at least $75,000.

When these deeds were made Clifton was a man of considerable fortune, and so far as appears, free from debt. He testifies that in October, 1872, when the first deed was executed, he was worth more than $265,000, and at the time of the making of the second deed, in April, 1873, more than $245,500; and that he was then owing but a few inconsiderable debts, which have been long since paid off. In a little over three years from the date of the first deed, Clifton's large estate was wasted and squandered, and he was hopelessly insolvent, and on December 4, 1875, was adjudged a bankrupt by the District Court for Kentucky, on his

own petition. The proved unpaid debts against him amount to about $13,000, and his estate has produced but a pittance for his general creditors. The appellant was duly chosen and qualified as the bankrupt's assignee, and an assignment duly made to him.

In his bill the appellant seeks relief because of the character of the deeds, being deeds made by Clifton directly to his wife, with the reservation to himself of general powers of revocation and to appoint the uses at his pleasure, on the grounds: 1. That the deeds are void, and passed nothing to Mrs. Clifton, but the property remained Clifton's own, under his absolute dominion and control for his own use, down to the adjudication and the assignment to appellant; 2. That the deeds were a contrivance on Clifton's part to defraud his future creditors and to evade the payment of his after-contracted debts by pretending to vest title in his wife while he reserved the use, control, and dominion over the property for his own benefit; 3. That the deeds are an attempt on his part to vest the title in his wife to be held by her in trust for his use, free from his future debts, and are therefore void; 4. That the property passed to and vested in appellant, as assignee, and he is entitled to the possession of it, to be administered as assets for the benefit of Clifton's creditors; 5. That appellees are in possession and refuse to surrender the property to appellant; and 6. That the deeds, of public record as stated, are a cloud on appellant's title, and will, unless decreed to be void, prevent him from disposing of the property for the purposes of administration in the bankruptcy proceedings. And he prays that the deeds may be declared to be void, and the appellees compelled to surrender the property to appellant to be so administered.

By their answer the appellees controverted all the allegations of the bill referred to, except that they were in possession and refused to surrender the property.

By an amended answer the appellees further plead, in substance, the circumstances of Clifton's fortune and freedom from debt at the time of the making of the deeds; that the settlements were in fact less than a fair and reasonable provision for

his wife made at her urgent solicitation; that the property was intended to be set apart for the separate use of the wife, free from the husband's control, as a provision for herself and children; that the deeds were drawn by counsel, understanding the facts, as sufficient for that purpose; that no fraud of any sort was contemplated or designed; that no power was intended or exists in Clifton to revoke the deeds for his own benefit; that he has never exercised, or intended to exercise, and disclaims any such power; that the power was intended and understood to be a power in him to appoint the uses to his children should occasion require; that if the said deeds provide in any other manner than against the property being applied to the benefit or subject to the liabilities of any one, except his wife and children, then it was through mistake and oversight in the drafting of the same; and the appellees pray that the same may be confirmed as intended to be made, with such corrections as may be necessary therefor, if any be necessary.

The following questions are involved in this cause, and are raised by the pleadings, exhibits, and proofs:

1. Whether the two deeds made by Clifton directly to his wife for her separate use, reserving, as they do, general powers to him to revoke the grants and appoint the uses at his discretion, are valid conveyances, or pass any estate or interest whatever to Mrs. Clifton?

2. Whether those two deeds, purporting to convey to the *feme* but an equitable estate, and leaving the husband with the legal estate in fee, coupled with absolute powers of disposition for his own use, do not clothe him with such an interest in and dominion over the property conveyed, and so really make provision for himself and not for his wife, that they are fraudulent and void even as to subsequent creditors?

3. Whether the property conveyed, or Clifton's legal interest in it, coupled with the powers reserved to him, did not by the assignment pass to and vest in his assignee in bankruptcy for the benefit of his creditors?

4. Whether the reserved powers themselves did not so pass to and vest in such assignee, so as to enable him to dispose of the property for the benefit of the creditors?

Assignment of Errors.

The circuit court erred, to the prejudice of appellant, in the decree rendered in this case, as follows:

1. In dismissing the bill.

2. In refusing to appellant the relief prayed in the bill, viz:

In refusing to decree the two deeds, of October 23, 1872, and of April 1, 1873, made by the appellee Charles H. Clifton to his wife, the appellee Nannie W. McN. Clifton, to be null and void, and of no validity or effect.

And in refusing to decree, order, and compel the said appellees to surrender and deliver possession of the real and personal property, purporting to be conveyed by the said deeds, to appellant to be administered by him as assets of the said Charles H. Clifton in bankruptcy.

Points and Authorities.

I.

The two deeds made by Clifton to his wife are void at law. The form of the conveyance, a covenant to stand seized, makes no difference. (Record, pp. 16–24.)

(Littleton, sec. 168; Co. Litt. 112 *a*; 4 Cruise's Digest, Title XXXII, Deed, chap. 2, sec. 33, marg. p. 21; 1 Bishop's Law Married Women, secs. 710–713.)

II.

And they are void in equity; for although, under circumstances, equity will uphold such deeds, it will not always do so, but sometimes allows the rule at law to prevail.

(1 Bishop's Law Married Women, sec. 717; Beard v. Beard, 3 Atk. 72; Moyse v. Gayles, 2 Vern. 385; Stoit v. Ayloff, 1 Ch. Rep. 33.)

III.

Equity examines such deeds with great caution. It does not sustain them unless it clearly and satisfactorily appears that the property is to be applied to the wife's separate use; or when they present some feature impeaching their fairness and certainty, as that they are not in the nature of a provision for the wife; or the property granted has not been distinctly separated from the mass of the husband's property.

(Wallingsford v. Allen, 10 Peters, 594; Sims v. Rickets, 35 Ind. 193.)

IV.

The deeds here nominally, but do not in fact, convey the property to the separate use of Mrs. Clifton, nor are they in the nature of a provision for her; nor did they distinctly separate the property from Clifton's other estate. It remained as much under his dominion after as before the deeds were made. The separate estate of a married woman is that alone of which she has exclusive control, independent of her husband, and the pro-

ceeds of which she may dispose of as she pleases. (Record, pp. 16–24.)

(Petty v. Malier, 14 B. M. 247; Harris's adm'r v. Harbeson, 9 Bush, 402; 2 Perry on Trusts (2d ed.), sec. 651.)

V.

The powers here are such as would have enabled Clifton to dispose of the property for his own benefit whenever he saw fit, and for him to have done so would not have been fraud on the powers.

(1 Sugden on Powers, marg. pp. 471 and 225; 2 *id.*, marg. pp. 181–198; Aleyn v. Belchier, 1 Eden, 132; S. C. 1 Lead. Cas. in Eq., marg. p. 377.)

VI.

The legal title to the property remained in Clifton. The deeds being void at law, only an equitable interest, if any thing, could pass by them, the legal title remaining with the husband, who, in a proper case, would be treated as a trustee for the wife.

(1 Bishop's Law Mar. Women, sec. 717.)

VII.

Clifton, then, under these deeds, held the legal title to the property, coupled with the power of disposing of it for his own benefit. This seems to be nothing less than absolute ownership.

(Bath and Mountague's case, 3 Cha. Cas. 100; Broad's case, Lee, 39; Bainton v. Ward, 2 Atk. 172; Ashfield v. Ashfield, 2 Vern. 287; Troughton v. Troughton, 3 Atk. 656; S. C. 1 Ves. 86; White v. Sansom, 3 Atk. 411.)

VIII.

The rule that equity never aids the non-execution of a power does not apply here, because this is not the case of a mere power, but of such an interest and such powers coupled in the husband as are incompatible with a separate estate in the wife.

IX.

And this is true, for the same reason, of the English rule with respect to the insertion of powers of revocation in voluntary deeds and settlements, followed in a few cases in this country. None of the citations for the appellees present a case like this, of direct deeds from husband to wife ostensibly for her separate use, but with unlimited powers of revocation and appointment in him.

X.

As these deeds really make provision for Clifton himself, by means of the large powers reserved, they are fraudulent and void, even as to subsequent creditors.

(Brinton v. Hook, 3 Md. Ch'y, 377; 2 Sugden on Powers, marg. p. 234; Tarback v. Marbury, 2 Vern. 210; Peacock v. Monk, 1 Ves. 132. See Burrill on Assignments (2d ed.), p. 179; Riggs v. Murray, 2 Johns. Ch'y, 565; S. C. 15 Johns, 571.)

1 Stanton's Revised Statutes of Kentucky, pp. 546–7, chap. 4, "Fraudulent Conveyances and Devises," sec. 2: "Every gift, "conveyance, assignment, transfer, or charge made by a debtor "of or upon any of his estate, without valuable consideration "therefor, shall be void as to all his then existing liabilities, but "shall not on that account alone be void as to creditors whose "debts or demands are thereafter contracted, or as to purchasers "with notice of the voluntary alienation or charge, and though "it be adjudged to be void as to a prior creditor, it shall not

"therefore be decreed to be void as to such subsequent creditors "or purchasers," does not sustain every voluntary recorded deed as to subsequent creditors, but merely alters the ancient rule that a deed declared fraudulent because of existing debts was so as to subsequent ones also.

XI.

The amended answer (Record, p. 38) and the deposition of Clifton (*id.* pp. 57, 58) assign different and conflicting reasons for the reservations of the powers; the first, that it was intended and understood to be a power in him to appoint the uses to his children; and the second, that the object was to enable him to shift and to reinvest without the necessity of a chancery suit. But there was no misunderstanding or mistake (Record, p. 38); the deeds were drawn as was intended. Clifton did not willingly make the deeds, at least the one of April 1, 1873 (Record, p. 46), and there could have been no necessity for a chancery suit, in the absence of the powers, as is apparent from the Kentucky statute of January 16, 1868, "An Act concerning the Separate Estates of Married Women," and which provides: That where real property has been or shall hereafter be conveyed or devised to a married woman, for her separate use, without the intervention of any trustee, and without any restriction upon the sale or conveyance thereof during coverture, the right of such married woman to sell and convey the said property shall be the same as if said property had been conveyed or devised to her absolutely, without any separate use being expressed, but her separate use shall continue in the proceeds of such sale. (1 Sess. Acts 1867–8, page 5.)

XII.

Either the property in controversy, or the reserved powers to be exercised for the benefit of the creditors, vested under

VIII.

The rule that equity never aids the non-execution of a power does not apply here, because this is not the case of a mere power, but of such an interest and such powers coupled in the husband as are incompatible with a separate estate in the wife.

IX.

And this is true, for the same reason, of the English rule with respect to the insertion of powers of revocation in voluntary deeds and settlements, followed in a few cases in this country. None of the citations for the appellees present a case like this, of direct deeds from husband to wife ostensibly for her separate use, but with unlimited powers of revocation and appointment in him.

X.

As these deeds really make provision for Clifton himself, by means of the large powers reserved, they are fraudulent and void, even as to subsequent creditors.

(Brinton v. Hook, 3 Md. Ch'y, 377; 2 Sugden on Powers, marg. p. 234; Tarback v. Marbury, 2 Vern. 210; Peacock v. Monk, 1 Ves. 132. See Burrill on Assignments (2d ed.), p. 179; Riggs v. Murray, 2 Johns. Ch'y, 565; S. C. 15 Johns, 571.)

1 Stanton's Revised Statutes of Kentucky, pp. 546–7, chap. 4, "Fraudulent Conveyances and Devises," sec. 2: "Every gift, "conveyance, assignment, transfer, or charge made by a debtor "of or upon any of his estate, without valuable consideration "therefor, shall be void as to all his then existing liabilities, but "shall not on that account alone be void as to creditors whose "debts or demands are thereafter contracted, or as to purchasers "with notice of the voluntary alienation or charge, and though "it be adjudged to be void as to a prior creditor, it shall not

"therefore be decreed to be void as to such subsequent creditors "or purchasers," does not sustain every voluntary recorded deed as to subsequent creditors, but merely alters the ancient rule that a deed declared fraudulent because of existing debts was so as to subsequent ones also.

XI.

The amended answer (Record, p. 38) and the deposition of Clifton (*id.* pp. 57, 58) assign different and conflicting reasons for the reservations of the powers; the first, that it was intended and understood to be a power in him to appoint the uses to his children; and the second, that the object was to enable him to shift and to reinvest without the necessity of a chancery suit. But there was no misunderstanding or mistake (Record, p. 38); the deeds were drawn as was intended. Clifton did not willingly make the deeds, at least the one of April 1, 1873 (Record, p. 46), and there could have been no necessity for a chancery suit, in the absence of the powers, as is apparent from the Kentucky statute of January 16, 1868, "An Act concerning the Separate Estates of Married Women," and which provides: That where real property has been or shall hereafter be conveyed or devised to a married woman, for her separate use, without the intervention of any trustee, and without any restriction upon the sale or conveyance thereof during coverture, the right of such married woman to sell and convey the said property shall be the same as if said property had been conveyed or devised to her absolutely, without any separate use being expressed, but her separate use shall continue in the proceeds of such sale. (1 Sess. Acts 1867–8, page 5.)

XII.

Either the property in controversy, or the reserved powers to be exercised for the benefit of the creditors, vested under

the bankruptcy act in appellant as the assignee of Charles H. Clifton.

(1 Sugden on Powers, marg. p. 224; Revised Statutes U. S., sec. 5046, Forms in Bankruptcy, Schedule B, 4.)

Argument.

The question in this case is, whether a husband not indebted at the time can, by the direct conveyance of his property to his wife for her separate use, but reserving to himself in the deed a general power of revocation and a general power of appointing the uses of such property, by deed or will, on his subsequently becoming indebted and bankrupt, so shield the estate conveyed from the claim of his assignee in bankruptcy and the creditors represented by such assignee.

Our contention is that he can not, whether the conveyance be considered as void *in toto*, or as valid until set aside, or whether the matter be viewed as at common law, or under our bankruptcy act.

The deeds made by Clifton to his wife are void *in toto* and *ab initio*. It results from the legal unity of husband and wife, that they can not contract with each other. Such contracts are wholly void at law. And this principle applies with full force to deeds or conveyances of land made by the *baron* to the *feme*.

"Also, though a man may not grant, nor give, his tenements "to his wife during the coverture, for that his wife and he be but "one person in the law; yet by such custome he may devise by "his testament his tenements to his wife, . . . for that such "devise taketh no effect but after the death of the devisor." (Littleton, sec. 168.)

"'A man may not grant, nor give, his tenements to his wife, "etc.' This opinion is cleare, for by no conveyance at the com- "mon law a man could during the coverture, either in possession, "reversion, or remainder, limit an estate to his wife. But a man "may by his deed covenant with others to stand seized to the

"use of his wife, or make a feoffment or other conveyance to "the use of his wife; and now the state is executed to such uses "by the statute of 27 H. 8, for an use is but a trust and confi- "dence, which by such a mean might be limited by the husband "to the wife. But a man can not covenant with his wife to stand "seized to her use; because he can not covenant with her for "the reason that Littleton her yieldeth." (Co. Litt. 112 *a.*)

(4 Cruise's Digest, Title XXXII, Deed, chap. 2, sec. 33, marg. p. 21; and 1 Bishop's Law of Married Women, secs. 710–713, are to the same general effect.)

It is plain, then, that the two deeds involved in this case are absolutely void at law.

But it is contended that although the deeds may be void at law, they are valid and will be upheld in equity.

Though equity frequently sustains such deeds, it by no means follows that it will do so in every state of case. It rather recognizes and enforces the legal rule, and does not depart from it except where there are good and substantial reasons for such departure.

(1 Bishop's Law of Mar. Women, sec. 717; Beard v. Beard, 3 Atk. 72; Moyse v. Gayles, 2 Vern. 385; Stoit v. Ayloff, 1 Ch. Rep. 33.)

The manner in which equity treats such contracts is well pointed out by this court in Wallingsford v. Allen, 10 Peters, 594. Mr. Justice Wayne, delivering the opinion of the court, says: "Agreements between husband and wife during the covert- "ure, for the transfer from him of property directly to the latter, "are undoubtedly void at law. Equity examines with great "caution before it will confirm them. But it does sustain them "when a clear and satisfactory case is made out that the prop- "erty is to be applied to the separate use of the wife. Where "the consideration of the transfer is a separate interest of the "wife, yielded up for the husband's benefit, or of their family, or "which has been appropriated by him to his uses. Where the "husband is in a situation to make a gift of property to the wife; "and distinctly separates it from the mass of his property for

"her use. Either case equity will sustain, though no trustee "has been interposed to hold for the wife's use. In Moore v. "Freeman, Bunb. 205, it was determined that articles of agree- "ment between husband and wife are binding in equity without "the intervention of a trustee. Other cases may be cited to the "same purpose. In regard to grants from the husband to the "wife an examination of the cases in the books will show, when "they have not been sustained in equity, it has been on account "of some feature in them impeaching their fairness and certainty, "as that they were not in the nature of a provision for the wife; "or when they interfered with the rights of a creditor; or when "the property given or granted had not been distinctly separated "from the mass of the husband's property."

Similar doctrines are laid down in Sims v. Ricketts, 35 Ind. 193.

Bishop, sec. 717, says: "It is obvious that not every deed "from a husband to his wife would be attended by such equities "as the court would enforce. For instance, it is not, if it is "merely voluntary, without consideration; one reason of which, "among others, would seem to be that, since to perfect a mere "gift there must be a delivery, this essential is lacking while the "title remains in the husband, the delivery of a deed void at law "not constituting a delivery of the land. Still, though the deed "is without a money consideration, yet if it is made as a rea- "sonable and fair provision for the wife, the husband's repre- "sentatives on his death can not avoid it, but it will be held "good in equity. Undoubtedly circumstances may arise in which, "though the deed is even on a valuable consideration, equity "will not uphold it, but the writer is not able to refer to any "such case, and the general rule clearly is that such a deed is "good in equity."

What the learned author would have thought of these unusual deeds we can only conjecture. We have not been able to find any thing like them in the books.

The authorities cited clearly show that equity does not blindly confirm every deed from husband to wife; that it does not always exclude the rule at law.

Are the deeds from Clifton to his wife, void as they are at law, such deeds as a court of equity will or ought to sustain?

Examining the deeds with the required caution, and applying to them the principles above indicated, it seems plain that there is no known principle upon which they can be sustained. Under such a test it becomes apparent that not only is no clear and satisfactory case made out that the property is to be applied to the separate use of the *feme*, but that the powers of revocation and appointment reserved to Clifton render the pretended conveyance to his wife's separate use illusory and a nullity; that the property here attempted to be conveyed is not distinctly or at all separated from the mass of the husband's property, but remains as completely under his control and dominion as before; that the reserved powers are features of the strongest character in these deeds, impeaching their fairness and certainty, and show emphatically that they were not really in the nature of a provision for the wife; that the rights of Clifton's creditors would be seriously interfered with if the deeds stand, because he, by his own act, would be left in possession and in the actual ownership and use of a valuable estate which could not be subjected to their debts, and they left only with the privilege of looking on in the vain expectation that he might, by the exercise of the powers, render the property liable at some period before their demands were barred by limitation or forgotten; and finally, that the deeds were not made as a reasonable and fair provision for the wife, but merely to secure the property to the husband by attempting to place it beyond the reach of his future creditors.

What sort of void deed is that from husband to wife, that a court of equity is asked to uphold, which gives with one hand and takes away with the other; which pretends in one breath to confer a separate estate on the wife, and in the next subjects it to the supreme dominion of the husband; which destroys the gift in the very act of giving?

Wallingsford v. Allen makes it a *sine qua non* that the property granted by the husband to the wife shall be conveyed or applied to the wife's separate use before the court can be in-

duced to sustain the deed. What is the wife's separate property? It is accurately defined in the Kentucky cases of Petty v. Malier, 14 B. Mon. 247, and Harris's adm'r v. Harbeson, 9 Bush, 402. In the first thus: "The separate estate of a married "woman is that alone of which she has the exclusive control, "independent of her husband, and the proceeds of which she "may dispose of as she pleases;" and in the second as follows: "As to the peculiar and distinguishing characteristics of a sepa- "rate estate in a married woman, as recognized and upheld by "the law of this state, it should be that to which she has the "sole and exclusive right, independent of her husband, unaf- "fected by any interest or use in him, and not subject to his "control." And Perry, in his work on Trusts (2d ed.), sec. 651, says: "The trust must be for the benefit of the wife exclusive "of all other persons" in order to create a separate estate in her; if for herself and her husband, or for her and her children, or for her and other persons, she will have no separate estate. Here the wife has not *the exclusive control of the property, independent of the husband.* On the contrary, the husband, by his right to revoke the grants, and his right to appoint the uses in any manner he pleases, and for the benefit of whom he pleases, even his own, has unlimited control over the property, and the wife's pretended separate estate is a shadow and a myth. Neither the property itself, nor its rents and profits, are beyond the control or reach of the husband. Such powers in the husband are utterly incompatible with a separate use in the wife; the two things can not exist together; there is no room for them side by side in such an instrument. The reserved powers destroy the supposed separate estate, and nothing vests under such deeds in the wife.

The early doubt whether a separate estate in a *feme covert* could be created without the intervention of a trustee, has long since been resolved, the courts universally upholding such estates so created, and treating the husband as trustee for the wife. Bishop accordingly lays it down that there is no real conflict between equity and law in respect to the deeds of husbands to

their wives; that while the law holds such a deed to be void and as not passing the legal title, the only title of which it takes notice, equity holds likewise that the legal title does not pass by such a deed, but remains in the husband, and that under the doctrines of that system of jurisprudence he becomes trustee of the property for his wife, in whom the equitable title is vested. He says, in his work above cited, vol. 1, sec. 717: "Thus while "at law the deed of a husband to his wife is a nullity, conveying "nothing, it is in equity, under the proper circumstances, good "and effectual. This is the outward semblance and such is the "language of the books. But when we turn to the inward "reality we find that there is no conflict between equity and law "here. Equity simply exercises a jurisdiction which the com-"mon-law tribunals have not; and not disputing that the legal "title still remains in the husband, holds him as trustee in re-"spect of it for the benefit of his wife." If this be correct, and it is undoubtedly well grounded in principle and authority, then Clifton occupies the attitude here of holder of the legal title to all the property embraced in these deeds, coupled with a general power of disposing of it for his own benefit. The legal title united with such a power is nothing but absolute, unqualified ownership.

Supposing these deeds to be valid to some purpose, still as the property and the reserved powers both move from Clifton, the estate or fee or ultimate use remains vested in him, subject merely to the defeasible fee or interest which his wife would take under the deeds. Lord Holt, in his judgment in Bath and Mountague's case, 3 Ch'y Cas. 100, lays it down, "That if he "from whom the estate moved doth reserve a power in any par-"ticular manner to limit any estate or estates by his will, the "whole fee simple is in him, and no [any?] act he doth do to "dispose of the estate will hinder him from executing of that "power," and for this doctrine he cites Broad's case, Lee, 39, where A, having levied a fine to the use of such persons as he by his last will should appoint, and afterward made a covenant to stand seized to the use of his second son in fee, and subse-

quently made his will in pursuance of the power, it was held that the estate passed by the covenant to stand seized, and that the execution of the power by the will came too late.

Considering this doctrine, resting on the very highest authority, can it be said that the person from whom the estate moves here, and who by the reserved powers retains complete dominion over that estate, has no interest in the property conveyed, merely because by the deed he vests a base or defeasible fee or interest in his wife. It would rather seem that he has really parted with nothing; that the property apparently passing from him by a deed in which he reserves to himself the absolute right to convey it or devise it for any uses he pleases, he is in fact and in law in possession of the same estate as he had before, subject in the most favorable view to the base or defeasible interest vested in the *feme*, which, as it depends entirely on his mercy and forbearance, is nothing but the ghost of a title. The husband by such a deed parts with no substantial interest in the property, but the substantial title remains in him.

Even in some of the cases cited by Sugden, 2 Powers, marg. pp. 27 and 158–9, to the point that equity never aids the non-execution of a power, such broad language as this is used, "Where there is a general power given or reserved to a person "for such uses, intents, and purposes as he shall appoint, this "makes it his absolute estate, and gives him such a dominio "over it as will subject it to his debts." Per Lord Hardwicke in Bainton v. Ward, 2 Atk. 172. Ashfield v. Ashfield, 2 Vern. 287; Troughton v. Troughton, 3 Atk. 656; S. C. 1 Ves. 86; and White v. Sansom, 3 Atk. 411, are to the same effect.

It must be remembered that the deeds here are purely voluntary, not based on a valuable consideration, and made by the owner of the fee with the large reservation of powers referred to. The case is not like that where property is conveyed or devised to one person, the legal and equitable interests passing by a valid instrument, and a general power of disposition is given to another. In the latter case the donee of the power has not and never had any interest in the estate; he may exercise the

power or not as he pleases; and never having had any ownership of the property, until he exercises or attempts to exercise the power equity does not regard that he has any interest in or title to the property affected, and therefore merely because of the naked power his creditors can not subject such property to their demands. This is the character of the cases cited by Sugden, or they were cases of conveyances made on valuable considerations, and the powers reserved or granted, while general in their character as to the objects of their exercise, were confined to limited interests in the property, or gave authority merely to charge the estate with specified sums of money. There was among them no case, and we do not believe that any case can be found like this, where a husband makes deeds directly to his wife, merely on a good consideration, purporting to give her a separate estate, and at the same time reserves to himself general and unlimited powers of revocation and of disposing of the estate granted. We must reiterate that it seems in this sort of case the husband parts with nothing, and remains in law, as he does in fact, the absolute owner, despite the deeds, of the property.

The argument on the other side proceeds on the provisions of these deeds considered disconnectedly: 1. That though the deeds be void at law, still as they purport to make a fair and reasonable provision for the separate use of the wife, equity will uphold them; 2. That considering the English rule with respect to the insertion of powers of revocation in voluntary settlements, adopted in a few cases in this country, the reserved powers here are unobjectionable; and 3. That until Clifton chooses to exercise the powers, the appellant will be entitled to no relief, because of the rule that equity never aids the non-execution of a power.

Our answer is, that the court will consider the whole of the deeds together in order to ascertain the effect to be given to them; that the English rule respecting powers of revocation has never been applied to the direct deeds of husbands to their wives, void deeds, which it requires the decree of a court of equity to uphold, but solely to deeds otherwise valid both at law and in equity; that it can not be pretended here that the powers

reserved were, in accordance with the English rule, necessary to the validity of these deeds, the instances, in which direct deeds from *baron* to *feme*, creating separate estates pure and simple, have been sustained, being too numerous for such a proposition to stand; that taking the character of the deed, the reserved powers do not permit the supposed separate estate to arise at all; and that the court will not sustain such deeds merely for the purpose of importing into this case the rule as to the non-execution of powers, which Sir Edward Sugden speaks of as "rather a refined distinction." (2 Powers, marg. p. 158.)

It is plain that Clifton might execute the general powers here for his own benefit (1 Sugden on Powers, marg. pp. 471 and 225), and to do so would not be a fraud on the power, for it would be within the scope of the power, and that doctrine applies to limited, not general, powers, and to such as are in the nature of a trust, which the powers reserved to Clifton are not. (See 2 Sugden on Powers, chap. 11, sec. 2, marg. pp. 181–198, and Aleyn v. Belchier, 1 Eden, 132; S. C. 1 Lead. Cas. in Eq., marg. p. 377, for instances of the kind of powers upon which fraud may be perpetrated.)

Conveyances to the use of the debtor, either in whole or in part, whether by secret or open trust, have always been held fraudulent as to all creditors present or subsequent. In this case the deeds are an attempt to vest a nominal ownership in the wife, while all the incidents of ownership remain with the husband. The conveyances are merely colorable transfers, and hence void.

In Brinton v. Hook, 3 Md. Ch'y, 477, a grantor conveyed nearly all his property *in trust:* 1. For the use of himself and his wife during their joint lives, with power to them jointly to dispose of it absolutely; 2. In case he survived his wife he was to dispose of it at pleasure; 3. Whether he survived her or not, then to such persons as he by will might appoint, and in case of failure of such appointment, then to his heirs at law: *Held*, by Johnson, chancellor, that this deed is fraudulent and void as against the creditors of the grantor, both existing and subsequent, because of the trusts in the grantor's favor.

And Sugden, 2 Powers, marg. p. 234, says: "This is not the "place to discuss the statute of 13 Elizabeth, ch. 5, which "avoids fraudulent gifts and settlements to defraud creditors, and "of course applies to a voluntary appointment where the ap- "pointor has also the interest; but we may simply observe that "although a *bona fide* voluntary settlement by a person not in- "debted at the time to the extent of insolvency would be sup- "ported against creditors, yet if it contain a general power to "the settler to dispose of or mortgage the estate, it will be "deemed fraudulent as against creditors by statute and judg- "ment, for a power of revocation in such a deed is said to be a "constant evidence of fraud; but a power to revoke for a par- "ticular purpose may not make such a deed void;" citing Tarback v. Marbury, 2 Vern. 510; and 2 (1) Ves. 132, per Lord Hardwicke.

Assignments in favor of creditors, reserving a benefit to the assignor, such as a power to revoke, have invariably been held to be void. (See Burrill on Assignments (2d ed.), p. 179; Riggs v. Murray, 2 Johns. Ch'y, 565; S. C. 15 Johns. 571.)

But it is said that such power of revocation has never been held to affect a family settlement. That must depend altogether upon the character of the settlement and the extent and effect of the power. If, as here, the deed be void except for the interposition of equity, and the extent and effect of the power be such as to overshadow the proposed grant, the power can not but affect the settlement in a very serious way.

Chapter 4, "Fraudulent Conveyances and Devises," section 2, of the Revised Statutes of Kentucky, 1 Stanton's edition, pages 546–7, re-enacted in the General Statutes of that state, pages 488–9, quoted under Point X, *ante*, only so far altered the old rules as to declare that a conveyance adjudged fraudulent as to existing creditors should not for that reason alone be held to be void as to subsequent creditors. In other respects the old rules prevail, and if a deed be fraudulent on its face because of powers reserved or provision made therein for the grantor, it is equally vulnerable whether attacked by prior or subsequent creditors.

The allegation in the amended answer, that the power was intended and understood to be a power in Clifton to appoint to the use of his children, beside not being justified by the terms of the powers themselves, is inconsistent with his testimony, in which he says, that he told his counsel, who drew the deeds, that he wanted the property placed in the most convenient way, so that he could shift it to California and reinvest it there, if he went there, without going through a long chancery suit to have it sold. Clifton, as his own deposition shows, made the deeds, at least that of April 1, 1873, reluctantly. His wife urged him to make it, but he "was hanging fire" about doing so, and made the deed to please his wife more than any thing else. The deeds are what they were intended to be, including the powers; there is no mistake in them. Notwithstanding his testimony, it is not even probable that Clifton misunderstood the legal effect of the powers. The counsel, who prepared the deeds and could have made this clear, was not called; the appellees could have called him, we could not. The Kentucky statute of January 16, 1868, quoted under Point XI, *ante*, shows that the powers were not necessary to a sale and reinvestment, and that Clifton's reason for their insertion is not true. He was really unwilling to let go his grasp on the property, and the manifest difference between a sale under the statute requiring his wife's consent, and one under the powers, he being able in the one case to convert the proceeds to his own use, and in the other not, must have induced him to prefer the powers. At any rate, whatever his reason for inserting the powers, and whatever he thought their legal effect was, there they are, and the undoubted effect of their reservation is to give him complete control and dominion over the property.

The remaining question is as to the effect of the bankruptcy act on these powers.

It is true that under the English statutes, prior to 6 Geo. 4, chap. 16, sec. 77, it was held, in several cases, that a power was not such an interest as would pass to the assignees. The cases are collected in 1 Sugden on Powers, marg. p. 224. Comment-

ing on the statute of 13 Elizabeth, chap. 7, sec. 2, which enables the commissioners to dispose of any estate for such use, right, or title as such offender then shall have in the same, "which he may lawfully depart withal," and on the statute of Jac. I, chap. 19, sec. 1, which directs the bankrupt laws to be expounded most favorably for the relief of creditors, the author says: "We "have already seen that a power is a mere right to declare the "trust of the estate, upon which declaration the statute of uses "immediately operates. It is therefore clearly a use, interest, or "right which the bankrupt *may lawfully depart withal;* and there "is considerable ground to contend that the bargain and sale of "the commissioners should have the same operation as a due "execution of the power by the bankrupt while solvent would "have had;" but he then goes on to show that the English courts held otherwise, and that the matter was remedied by the enactment of the statute of 6 Geo. 4, above referred to, which authorized the assignees to execute for the benefit of the creditors all powers vested in the bankrupt, which he might legally execute for his own benefit.

The questions now presented seem to be entirely new and undetermined in this country.

But it is believed that the words of section 5046 of the Revised Statutes are broad enough to vest in the assignee here either the property in question or the powers reserved to the bankrupt, so that he may exercise them for the benefit of the creditors.

The words of that section are very comprehensive. Among other things they vest in the assignee "all the property con- "veyed by the bankrupt in fraud of his creditors; all rights in "equity; . . . . and all his rights of action for property "or estate, real or personal; . . . . all his rights of redeem- "ing such property or estate; together with the like right, title, "power, and authority to sell, manage, dispose of, sue for, and "recover or defend the same, as the bankrupt might have had "if no assignment had been made," etc. These words seem to be wide enough and to have been intended to pass to the as-

signee not only all the bankrupt's property and rights, but also all estate, subject to general powers in him, which he could exercise for his own benefit, or at least such general powers themselves to be exercised by the assignee for the benefit of the creditors. It is not to be presumed that the bankruptcy act was left open on the same important point, about which doubt had been had under the English statutes, and which had been cured by special legislation there.

In accordance with the view we seek to maintain, we find that under the rules and forms in bankruptcy prescribed by the justices of this court, under the authority of the act, the bankrupt was required to schedule "property in reversion, remainder, "or expectancy, including property held in trust for the peti- "tioner, or subject to any power, or right to dispose of, or to "charge," as it is in the caption of the form; or "rights and "powers, wherein I, or any other person or persons in trust for "me or for my benefit, have any power to dispose of, charge, or "exercise," as it is in body of the form. (See Schedule B, 4.)

We do not cite this as a judicial decision, but as an exposition of the statute, shortly after its passage, by the justices in the discharge of duties imposed on them by the law, and as such we think it entitled to great weight, now that the point has come up for judicial determination.

It is true that by sec. 5053, "no property held in trust by "the bankrupt shall pass by the assignment;" but we have endeavored to show that this is something more than property held in trust by the bankrupt; that it is held by him for his own use.

We respectfully ask a reversal of the decree appealed from.

B. H. BRISTOW,
JAMES A. BEATTIE,
Counsel for Appellant.

Supreme Court of the United States.

S. E. JONES, Assignee in Bankruptcy of Charles H. Clifton, Appellant;

VERSUS

CHARLES H. CLIFTON, and NANNIE McNAIRY CLIFTON, his Wife, Appellees.

Brief for Appellees.

Powers of Revocation and Appointment, in Family Settlements.

BIJUR & DAVIE,
For Appellees.

Supreme Court of the United States.

STEPHEN E. JONES, Assignee in Bankruptcy of Charles H. Clifton, Appellant,
VERSUS
CHARLES H. CLIFTON and NANNIE McNAIRY CLIFTON, Appellees.

Brief for Appellees.

Stephen E. Jones, as assignee in bankruptcy of Charles H. Clifton, filed his bill in equity against said Charles H. Clifton and Nannie McNairy Clifton, his wife, to set aside two deeds of settlement, executed by said Clifton to his said wife about two years before his bankruptcy. The bill alleged that said deeds were void, and that they were a cloud on the title of the assignee. The prayer was for a removal of said alleged cloud, by declaring the deeds void. The court below held the deeds valid, and dismissed the bill. The assignee appeals.

THE FACTS.

In 1870, Charles H. Clifton, being then about twenty-five years of age, and possessed of a fortune of over $250,000, married the defendant, Nannie McNairy.

Prior to his marriage he had taken out three policies of life insurance of $10,000 each. He took out those policies, he says, "for the benefit of my wife, if I should ever have one, and children. Of course it would be of no benefit to me otherwise." (Clifton's deposition, record, page 18.)

Soon after his marriage he took out two other policies of $10,000 each, intending them also for the benefit of his wife and children (Record, 19 and 24). He omitted, however, to have them made payable to her, because of his ignorance of law. He says, "I had no idea of law terms. I did not know the first thing about law." (Record, 25.)

In October, 1872, a friend of his, Julius Dorn, died; on whose life there were several policies of insurance. Dorn proved insolvent, and there was trouble over his policies. This caused Clifton to learn

that his own policies were not properly shaped. He says, "Just before I transferred those policies to my wife, Julius Dorn had died, and I noticed that they had gotten on his policy of insurance; there was some trouble over it, I don't know how; and I thought that these policies of mine should be secured to my wife, as they were really taken out for her benefit" (Record, 19). "I had neglected having it changed, until after Julius Dorn's death; that was what made me do it" (Record, 24).

Accordingly, Clifton went to Col. R. W. Woolley, his counsel, and requested him to fix the policies right. Col. Woolley prepared a deed, settling the policies on Mrs. Clifton, as her separate estate; and told Clifton that it would be better to record it, and that, to make it a recordable instrument, he should put in a piece of real estate. Clifton thereupon furnished the description of a small piece of land, worth about $700. It was inserted, and the deed was executed and recorded, on October 23, 1872. Those policies of insurance were then of the cash value of about $12,000. They have since been surrendered, and paid up policies have been taken out in their place, amounting to $14,816 (Record, 15).

On April 1, 1873, Clifton made a second deed to his wife, by which he settled upon her his ancestral home of thirty-five acres in Jefferson county, Ky., worth about $18,000, and on which he at once erected a new house at a cost of $8,500. This property has since greatly depreciated in value. He says, "I did it through kindly feeling for my wife, and to please her—more to please her than anything else. She was pressing and persuading me to do it. And another reason was her idea, that she held out to me, that our children would have enough, after deeding the property. One of them had died just before I made the deed, while I was hanging fire. I thought myself that I had plenty, and did not think I ought to give them anything; but she kept on begging me, and I gave it to her, more on that ground than anything else. Both of my children that I had at that time, died before I could move to the place, after giving it to her. She insisted on going to the country, thinking it would save their lives; but, after getting there they both died, after giving it to her" (Record, 20). He has now two living children.

In the autumn of 1873 the great financial panic came, and the estate of Clifton, composed of land and stocks, shrank away into nothing. This, together with his losses in going surety for others, and other indiscretions and bad management, during 1874 and 1875, resulted in his bankruptcy on December 4, 1875. He was not aware that he was broke, until a few days before his bankruptcy. (Record, 24.)

As said by this court in Sexton vs. Wheaton (8th, Wheaton 251): "Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart."

The said conveyances were each "to her the said Nannie and her heirs forever, as her own separate estate, free from the control, use and benefit of her husband."

Each conveyance also contained the following provision: "But it is provided, and is now so declared, that the said Charles H. Clifton doth reserve, retain and hold the power to revoke the grant herein made, in whole or in part, or parts, to any uses he may appoint, and to such person or persons as he may designate, and he may cause such uses to spring or shift as he may declare. But in default of appointment or appointments by him, and to the extent that he may fail to appoint, declare, or designate, all the estate, land or policies included, and such part or parts as have not been appointed, or concerning which there has been no declaration of use or designation of person or persons under the power reserved, shall *remain* to her the said Nannie and her heirs forever as her separate estate as aforesaid."

The history of this last clause is thus given in Clifton's deposition: (Record, page 25.)

"Int. 56—Did, or not, you authorize your counselor or advise him to make such a settlement that you could set it aside in your own favor at any time?

"Ans.—No; I did not want that at all. I wanted it for the benefit of my wife and children.

"Int. 57—What was your understanding of the deed in that particular at the time you signed it?

"Ans.—I understood it was giving it to her.

"Int. 58—Had you ever received any legal education, or were you familiar with law terms at the time you signed the deed?

"Ans —I had no idea of law terms. I did not know the first thing about law.

"Int. 59—Did you dictate the terms of that deed, or by whom were they prepared?

"Ans.—They were prepared by my lawyer, Col. Woolley. I did not dictate the terms of the deed. I wanted a deed of settlement made on my wife." (Record, 25.) There were exceptions filed to Clifton's testimony, in the court below, on the ground that he could not testify in favor of his wife. The court, however, held, properly, that he was a competent witness. (Booth vs. Vanarsdale, 9 Bush, Ky. 719; Lucas vs. Brooks, 18 Wallace, 453.)

In his answer Clifton says he "has never exercised or claimed any such power of recalling said property to himself, and disclaims any such intention or right, and says that he intended by said settlement to avoid and provide against said property ever being applied to the benefit, or subject to the liabilities, of any one except his wife and children; and, if the said deeds provide in any other manner, it was through mistake and oversight in the drafting of the same; and respondents pray that the court will confirm the same as intended to be made, making such corrections in the same as may be necessary

therefor, if any be necessary." (Record, 16.) This averment is fully substantiated by the proof.

At the time Clifton made the settlement by those two deeds, he was worth over $250,000, had no debts, was in no business, and had no intention of going into any business. He had no idea of ever being insolvent, and thought he had sufficient to live on all his life, without labor or care. (Record, 19.)

The amount so settled on his wife, as found by the court below, "did not embrace more than one-sixth of his estate."

It is not pretended that there was any fraudulent *intent*, or that the deeds were actually intended to affect creditors. The bill does not allege that Clifton owed anything when he made the settlements; and it charges only a *constructive* fraud against "*future*" creditors, and "any debts he might *thereafter* contract." (Record, 4.)

The learned counsel for the assignee argued in the court below, and will probably argue here, five propositions:

First, That the said conveyances from Clifton, direct to his wife, were void in law, and did not divest Clifton of the title; because a husband can not convey directly to his wife.

Second, That the said conveyances were void in law, and did not divest Clifton of the title; because of the *power of revocation and appointment* reserved therein to the grantor.

Third, That the said *power of revocation and appointment* was *property and assets* of said Clifton, and passed to his assignee in bankruptcy as such, and can be executed by the assignee, for the benefit of creditors.

Fourth, That the court will *compel* Clifton to execute the said power in behalf of his said assignee, for the benefit of his creditors.

Fifth, That the *assignment* of Clifton in bankruptcy operated as an *execution* of the said *power* of appointment, in favor of his *assignee*.

We will consider these propositions in their order:

I.

The right of a husband to settle a reasonable portion of his estate upon his wife or children will hardly be denied at this late day. It is not only his right, but a recognized duty.

"It is positively right, founded in the instinctive conviction of all right-minded men, that the future comfort and support of the wife and minor children shall be provided for; the law favors and encourages it; and when a settlement made for such purpose is attacked for fraud, the fraud must be made to appear by clear and satisfactory evidence." (White vs. Bettis, 9 Heiskell, Tenn., 651.)

"It would seem to be a consequence of that absolute power

which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. * * * A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors on the ground of its being voluntary." (Sexton vs. Wheaton, 8 Wheaton, 242–250.)

Not only has a husband the right to make such a settlement, when he is free of debt, as in this case; but a husband who is in debt at the time may also make such a settlement, provided he retains an amount which seems at the time to be reasonably sufficient to pay off his then existing debts. (Sexton vs. Wheaton, *supra;* Lloyd vs. Fulton, 1 Otto, 480.)

The fact that the husband afterwards becomes insolvent does not affect the previously executed settlement. Such deeds are always made to save the wife or children in the very event of the husband being unfortunate in the future. The subsequent insolvency of an ordinary donor does not affect the gift previously made by him. Much less can the subsequent insolvency of a husband affect a previous settlement upon his wife or children.

These principles are settled as rules of property in Kentucky, where this settlement was made; and have been often recognized and enforced by this court. (Haskell vs. Bakewell, 10 Ben. Monroe. Ky., 209; Sexton vs. Wheaton, 8 Wheaton, 229; Hinds vs. Longworth, 11 Wheaton, 211; Lloyd vs. Fulton, 1 Otto, 485; Smith vs. Vogdes, 2 Otto, 183.)

The Kentucky statute, declaring voluntary conveyances void as against creditors existing at the time, does not affect this case. That statute applies only to "antecedent" creditors, and expressly provides that a deed shall not be void as against "subsequent" creditors, merely because it is voluntary. (General Statutes of Kentucky, page 488, section 2; 2 Bush, Ky., 72.)

As Clifton's settlement was only of about one-sixth of his estate; as his creditors are all subsequent to and unconnected with the settlement; as the deeds were immediately made public by recording; and as the bill only charges them to be void as against "*future* creditors," whose "debts he *might thereafter* contract," it would seem very clear that the settlement was proper and lawful.

The counsel for the assignee contend, however, that the fact that the deeds of settlement were made by the husband direct to the wife, without the intervention of a trustee, rendered them void, and ineffectual to pass the title to her.

But, when it is remembered that the settlement was to the wife's "sole and separate use," and that this is a suit in equity, this objection will be easily disposed of.

"It has for more than a century been established in courts of equity, that the intervention of trustees is not indispensable; and

that whenever real or personal property is given or devised or settled on a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also." (Story's Equity Jurisprudence, section 1,380.)

"At *common law* the husband and wife are treated as one person; her legal existence is merged in that of her husband; their contracts made when single are avoided by intermarriage; when made during coverture they are of no binding obligation; the husband can neither grant to or covenant with his wife, for that supposes her to possess a separate existence. From this principle arises the necessity at *law*, of all conveyances, covenants, marriage settlements, and the like, being made through the interposition of trustees. Courts of *equity*, for more than a century, have disregarded the rule, and for many purposes treat husband and wife as distinct persons, capable of contracting with each other and having separate estates, debts and interests." (Barron vs. Barron, 24 Vermont, 398.)

"As a general rule, wherever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity when made by the husband and wife with each other, without the intervention of trustees." (Maraman vs. Maraman, 4 Metcalfe, Ky., 89.)

"Whenever a (husband's or wife's) contract would be good at law when made with trustees for the wife, that contract will be sustained in equity when made with each other without the intervention of trustees." (Sims vs. Ricketts, 35 Indiana, 193.)

To the same effect see also the following cases, selected out of many on account of their appositeness:

Shepard vs. Shepard, 7 Johns, ch. 56; Jones vs. Obenchain, 10 Grattan, 259; Wallingsford vs. Allen, 10 Peters, 594; Baddely vs. Baddely, Law Reports, 9 Chancery Division, 113; Randall vs. Randall, 37 Michigan, 571; Wells vs. Treadwell, 28 Mississippi, 717; Story vs. Marshall, 24 Texas, 307.

In many of the cases, *dicta* will be found to the effect that such conveyances, directly between husband and wife, while good in equity, are void *at law*. But the more modern and consistent authorities hold that the fanciful and fictitious distinction is obsolete, and that the deed is valid everywhere. Indeed the distinction, if it exists in theory, is never practically enforced; for controversies respecting such settlements to the wife's separate use, arise only in equity.

"It is assumed that the deed from the appellant to his wife for the real estate in question is void, because it was made by the husband directly to his wife. * * * The distinction made and discussed in this and other cases between the deed from husband to wife, when

considered by a court of law, and when considered by a court of equity, is more imaginary than real, so far at least as concerns the courts of this State. Why the same instrument should be regarded by one court as nothing, and by the other as valid and effective as a conveyance of the title, is not easily seen; and yet, such *was* the law. * * * Why then shall we longer speak of the same instrument as being void at law but valid in equity? As the fact is recognized that the husband may, by deed made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties; that is, to hold them valid until some legal reason has been shown for setting them aside?" (Thompson vs. Mills, 39 Indiana, 532; Burdeno vs. Ampere, 14 Michigan, 93.)

It is sufficient for our case, however, that the settlement be good in *equity*.

It results from these considerations that the deeds from Clifton operated to convey and vest the estate fully in his wife, "as her separate estate, free from the control, use and benefit of her husband."

II.

The effect of the reservation of the power of revocation and appointment is the next point to be considered. The learned counsel for the assignee in bankruptcy contend, that the reservation by Clifton of the power of revocation and appointment, *per se*, rendered the deed void, either for repugnancy, or as a fraud on "future creditors."

In considering this point it should be borne in mind that the deeds in this case were in the nature of a family settlement; that they were drawn up by a skillful conveyancer and executed by a young man utterly ignorant of the forms of law; that there was no fraudulent intent; and that Clifton has never since claimed or asserted any interest in or right over the property.

It should also be remembered that the deeds first purport to convey—to vest—the title in the grantee. The property is conveyed by the fullest words of conveyance. The *title* is not reserved, but only a *power*. If the power should never be exercised, the property was, by the terms of the deed, "to *remain* to her, the said Nannie, and *her heirs* forever as her separate estate."

Unless, and until Clifton should exercise the power, he would have no control, management or use of the property. He would have neither the title nor the profits. (2 Washburn Real Property, 647.)

The doctrine of powers covers a very extensive field. The more familiar examples of powers, are powers of attorney to sell lands, powers of sale, etc., etc.

"Powers of revocation and appointment" are "of a more latent and mysterious character." (4 Kent's Commentaries, side page 315) They are, however, "fully recognized here as forming a part of the American law." (2 Washburne on Real Property, side page 313.)

Such powers, while previously recognized and sometimes used, (Chance on Powers, sections 5 to 12), first came into general use under the Statute of Uses, of 27th Henry VIII. They are the equitable substitute for, and improvement on, common law conditions in deeds.

By means of conditions, the conveyancer at common law can vest the legal title to an estate in one person, and provide that upon the happening of a certain event or condition of things, said legal title and estate shall be lifted out of the grantee, and be vested in another and a different person.

By means of powers of revocation and appointment, the draughtsman in equity can accomplish the same purpose; only substituting for the happening of a certain event, the voluntary exercise of the power vested in a named person. In an estate upon condition, the estate is to remain vested until divested by some named event to happen under the the ordinary laws of nature. In the case of a power, the estate, likewise, remains vested in the grantee, until the holder of the power sees fit in his discretion to divest it, and to vest it in some one else. Both are modes of limiting estates, and the one mode is as valid as the other.

Powers of revocation and appointment, says Kent, "are so much more convenient and manageable than common law conditions, that they have been largely introduced into family settlements." (4 Kent's Comm., side page 315.) "Powers, being found to be much more convenient than conditions, were generally introduced into family settlements." (Greenleaf's Cruise's Digest of Real Property Law, vol. 4, side page 134.) "To obviate the inconveniences of the strict technical rules, powers were chiefly introduced, particularly in connection with family settlements." (2 Hilliard on Real Property, 557.)

"As powers have been chiefly made use of in effecting family settlements, which are *comparatively* infrequent in this country, they have been rarely applied, though *fully recognized here* as forming a part of the American law." (2 Washburn on Real Property, side pages 312, 313.)

"Family settlements may often require such powers of revocation to meet the ever varying interests of family connections." (Ch. Kent in Riggs vs. Murray, 2 Johnson's Ch. R., 576.)

In the form books of conveyancing, powers of revocation and appointment will be found in well nigh all prescribed forms of deeds of family settlement.

Such powers are sometimes termed powers of "revocation and appointment," and sometimes powers of "appointment" merely. They mean the same thing, however, for "every power of appointment is strictly a power of revocation; for it always postpones, abridges or defeats, in a greater or less degree, the previous uses and estates, and appoints new ones in their stead." (4 Kent's Comm., side page 315.)

Such powers of revocation and appointment may be granted to some third person, "or they may be *reserved* to the *grantor*." (2 Washburn on Real Property, side page 314.)

"Powers of appointment and revocation may be *reserved* in conveyances under the Statute of Uses, as well as in conveyances at common law." (4 Kent's Commentaries, side page 322.)

And, indeed, "in a *deed executing a power*, a power of revocation and *new* appointment may be *reserved*." (4 Kent's Commentaries, side page 336.)

"The owner may either *reserve* the power to himself, as a qualified dominion, distinct from the legal title, or he may delegate it to strangers." (2 Hilliard on Real Property, page 558.)

"Powers of revocation and appointment may be *reserved* either to the original owner of the land, or to strangers." (Greenleaf's Cruise's Digest of Real Property, vol. 4, side page 134.)

"A power of appointment or revocation may be *reserved*, either in the body of the deed, or by separate indorsement before the execution of it." (1 Sugden on Powers, side page 158.)

If we turn from the text-writers to the courts, we find that, by a long series of decisions, it is settled that not only is the reservation of a power of revocation and appointment proper in such deeds of settlement, but that the *failure* to reserve such a power renders the deed suspicious, and often invalidates it.

"Power of appointment does not prevent the fee vesting, subject to be divested by the execution of the power. Such a power is a mode which the owner of the estate reserves to himself or gives to another, through the medium of the Statute of Uses, of raising and passing an estate." (Maundrell vs. Maundrell, 10 Vesey, 246.)

In Coutts vs. Ackworth (Law Reports, 8 Equity, 567), where there was a voluntary family settlement made and the draughtsman failed to insert a power of revocation, the deed was held to be invalid, the court saying: "Where the circumstances are such that the donor under the deed ought to be advised to retain a power of revocation, and a power of revocation is not inserted, it is fatal to the deed. * * * It is the duty of the solicitor to insist that there should be, and almost to go to the extent of refusing to execute such an instrument unless there be, a power of altering that which was done, so as to meet the various exigencies that may arise in future life. In my opinion, the fact of there being no such power of revocation is all but conclusive reason for setting aside the deed."

That case probably went too far, in holding that the absence of a power of revocation was *per se* such conclusive evidence of *mistake* as to require the deed to be set aside.

"The true rule is that which was laid down by Lord Justice Turner in Toker vs. Toker (3 De Gex, Jones and Smith, 491), that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight, according to the other circumstances of each case." (Hall vs. Hall, Law Reports, 8 Chancery Appeals, 438.)

To the same point, and showing that a power of revocation is not only a proper, but indeed a necessary clause in a deed of family settlement, see Hugenin vs. Baseley 14 Vesey, 273; Coutts vs. Ackworth, Law Reports, 8 Equity, 558; Walloston vs. Tribe, Law Reports, 9 Equity, 44; Everett vs. Everett, Law Reports, 10 Equity, 405; Hall vs. Hall, Law Reports, 14 Equity, 365; Phillips vs. Mullings, Law Reports, 7 Chancery Appeals, 244; Hall vs. Hall, Law Reports, 8 Chancery Appeals, 430; Toker vs. Toker, 3 De Gex, Jones & Smith, 491.

In many of those cases the deeds of settlement were set aside because such a power was not inserted.

The same principles have been frequently announced by the courts of this country. Thus in Russell's appeal (75 Pa. St., 288), where there was a family settlement made without reserving a power of revocation, the court said: "It may be admitted also that the mere omission of counsel to advise the insertion of a power to revoke, will not alone be ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight, when joined to other circumstances, tending to show that the act was not done with a deliberate will."

The same thing was decided on a very full review of the authorities, in Garnsey vs. Mundy (24 New Jersey Equity, 247). See also Johnston vs. Zane (11 Grattan, 569), and Johnson vs. Cushing (15 New Hampshire, 298). See also the American note to Hugenin vs. Baseley (2 Leading Cases in Equity, 4th edition, pages 1250 to 1256).

As to the objection that the clause in question, reserving the power of revocation and appointment, is *repugnant* to the absolute grant in the prior part of the deed, we think it is easily disposed of. Indeed, it has already been disposed of, by showing that in equity, under the Statute of Uses, it is not repugnant to convey the estate to one, and to reserve or convey a power to another.

In none of the books will even an intimation be found that the insertion of a power of revocation and appointment in a deed of family settlement, or in any other *bona fide* deed, renders it void for repugnancy.

"In voluntary conveyances and deeds there are frequently provisos containing powers of revocation, which, being coupled with

a use, and tending to pass by raising of uses, are allowed to be good, and not repugnant." (Jacob's Law Dictionary, title "Revocation.")

And even if it were to be held that all the text writers and cases we have cited are in error, and that the reservation of such a power is repugnant to the grant of the estate, it would not benefit the appellant in this case. It would only render the *power void*, and the prior words of grant to Mrs. Clifton would remain absolute.

"If the *habendum* be repugnant to the *premises*, it shall be void; as, if a grant be of all his term, *habendum* after his death, the *habendum* will be void. And the grantee will take the estate given in the premises; a consequence of the rule that deeds shall be taken most strongly against the grantor, and therefore that he will not be allowed to contradict or retract, by a subsequent part of the deed, the gift made in the premises." (4 Comyn's Digest, 392; title "Grant," E., 10, and note M.)

"If anything be granted generally, and there follow restrictive words which go to destroy the grant, they are rejected as being repugnant to that which is first granted." (2 Parsons on Contracts, 513, note O.)

"When a power is *void*, or when no appointment is made under it, the estates limited in the instrument creating the power take effect in the same manner as if the power had not been inserted." (4 Kent's Comm., side page 324.)

In Daniel vs. Veal (32 Georgia, 593). Daniel made a written deed of gift of a slave, to Veal, "reserving to myself the right of revoking this deed of gift." The court held that the part of the writing which reserved the power was void, and the gift was *absolute* to the *grantee*. The court recognized that in deeds of settlement like Clifton's, such a power is valid, for they say: "It can scarcely be necessary to add that we decide this case upon *common law* principles, regarding it entirely *dehors* the Statute of Uses and the construction given to that statute in equity."

Nor will any authority be found which holds that the reservation of such powers in such deeds of settlement renders the deed *fraudulent* and void as to "future" creditors, nor, indeed, as to any creditors.

It is true that by the fifth section of the statute of 27 Elizabeth it was provided that "if any person shall make any conveyance of lands, with a *clause of revocation* at his will and pleasure, of such conveyance," and shall afterward bargain, sell, demise, grant, convey, or charge said lands to any person for money or other good consideration, said former conveyance should, as against such subsequent grantee, be void. (4 Greenleaf's Cruise, side page 431.) But that statute does not apply to creditors. It applies only to purchasers for value. (*Ibid*.) And an assignee in bankruptcy simply represents the creditors and the bankrupt, and is not a "purchaser for

value." (*In re* Arledge, 1 Bankrupt Register, 195, second edition, 644; Mitchell vs. Winslow, 2 Story's Reports, 637–638, where the authorities are fully cited; 2 American Leading Cases, 233; 1 American Leading Cases, 52; 2 Leading Cases in Equity, 87.)

Besides, that statute is not in force in Kentucky. By the act adopting the Kentucky "Revised Statutes," in 1852, "all statutes of a general nature, whether of this State, of Virginia, or of *England*," adopted prior to the adoption of that revision, were repealed. (1 Revised Statutes of Ky., page 177; General Statutes of Ky., 137.) And there is no similar statute in Kentucky.

In the court below the learned counsel for appellant cited several text books and cases to the effect that a power of revocation, reserved by an insolvent debtor, in a deed of *assignment* for the *benefit* of creditors, would render the deed fraudulent and void. Among others they cited the case of Tarbuck vs. Mabury (2 Vernon, 510), and the misleading text in 2 Hovenden on Fraud, 229, based exclusively on that case. That case was fully exposed by Chief Justice Thompson, of New York, in the case of Riggs vs. Murray (15 Johnson's Reports, 588).

But such cases stand on a very different ground from family settlements. The leading American case on this subject is Riggs vs. Murray (2 Johnson's Ch. R., 576), and, on appeal, 15 Johnson's R., 588.

In that case an *insolvent* debtor made a deed of assignment to a trustee for the benefit of certain favored creditors, excluding other creditors, and reserving to himself the right to revoke the deed whenever he pleased. Chancellor Kent, at the suit of the excluded creditors, held the deed void, saying: "The necessary inference seems to be that it was made to delay, hinder and defraud creditors. *Family settlements* may often require such powers of revocation to meet the ever varying interests of family connections; but it is difficult to perceive a proper motive in a debtor who means nothing more or less than the payment of his debts, to reserve, in the very instrument of assignment, a right to recall the *payment*. The only effect of *such* an *assignment* is to mask the property."

The case was appealed to the Court of Errors, and Chancellor Kent was reversed, the court, by Chief Justice Thompson, saying: "Where the creditor is pursuing his debtor with judgment and execution, or in any other manner to enforce the payment of his demand, an assignment of the debtor's property containing a power of revocation may very well be considered as made to delay, hinder or defraud creditors, according to the language of the Statute of Frauds. * * * An assignment of property in trust, by a *debtor*, with power of revocation, is fraudulent only as regards judgment creditors, or such as are taking measures to obtain payment of their debts. * * * But I do not see how it could in any sense be said to delay or hinder a creditor who was taking no measure to enforce pay-

ment of his demand, as is the case now before us." (Murray vs. Riggs, 15 Johnson, 588.)

It will be observed that not only was the validity and propriety of a power of revocation in a deed of family settlement fully recognized in that case, but it was held that the reservation of such a power, even by an insolvent in a deed of assignment, would not render it fraudulent unless the deed be made under such circumstances as to show that it was intended to evade urgent creditors.

In this case it was a family settlement, and there were no creditors in existence at the time the deeds were made.

III.

The learned counsel for the appellant next contend, that the power of revocation and appointment reserved to Clifton was *per se* an asset or estate, which passed to the assignee, by the assignment in bankruptcy.

Their argument utterly ignores the difference between a power and property. A power is not property, nor an interest in property. It is the very antithesis of property. A power of attorney to convey lands was never supposed to vest the property in the attorney. One holding a power may lift the property out of a person and put it in another, or even in himself. If he does the latter, he then has an estate. But until he does that he has none.

In this case the property was conveyed to Mrs. Clifton. She was the owner. Clifton did not reserve any estate in it. He reserved only a power. That power he might exercise, or he might not. Unless he should choose to execute it, the property, unaffected by it, would continue absolute in Mrs. Clifton, and pass to *her heirs* at her death.

Clifton did not execute that power, nor did he ever attempt to do so. Indeed, in his answer, it will be remembered he expressly disclaims the power, or any and all intention or purpose to ever execute it. (Record, page 16.)

"This sort of power is a mode which the owner of the estate reserves to himself or gives to another person, through the medium of the Statute of Uses, of raising and passing an estate." (Maundrell vs. Maundrell, 10 Vesey, 266.)

"A power, unexecuted, is not assets to pay debts." (Harrison vs. Battle; 1 Devereux & Battle, Equity, 215.)

"Mere power, unexecuted, in a tenant for life, who becomes bankrupt, *does not vest in his assignee.*" (Townshend vs. Windham, 2 Vesey, Sr., 1.)

"There is an evident difference between a power and an absolute right of property. A power * * * is a bare authority. * * * It is not an estate, and has none of the elements of an estate. * * * A general power of disposition, existing as a

power, does not imply ownership; in fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee simple in the party who possesses the power." (Burleigh vs. Clough, 52 New Hamp., 271.) To the same effect, that an unexecuted power of revocation and appointment is not assets and does not pass as such to the administrator, or assignee in bankruptcy, see Holmes vs. Cowgill (7 Vesey, 506), same case (12 Vesey, 206); Thorpe vs. Goodall, 17 Vesey, 460; Commonwealth vs. Duffield, 12 Pa. St., 280; Williams on Executors, side page 1,435; 2 Leading Cases in Equity, 378 (last edition); Story's Equity Jurisprudence, sec. 176, note; 1 Sugden on Powers, side page 224, and cases cited.

The reason is simply that until the power is executed the property belongs to the grantee; and the grantee's property can not be taken and applied to the payment of the debts of the holder of the power. "The creditors have no right, according to the established doctrine, to have the money raised on the *estate of a third person*, when the power was not executed. * * * This would be to destroy all distinction between a power and absolute property." (4 Kent's Comm., 340.)

"It can not be maintained that this is absolute property, so as to be assets for creditors without any act done, except by striking at once out of the books the very notion and character of a power." (Lord Chancellor Erskine, in Holmes vs. Cowgill, 12 Vesey, 214.)

The principal reliance of appellant's counsel, in the court below, on this point, was upon the case of Bainton vs. Ward (2 Atkyn's R.) But in Townshend vs. Wyndham (2 Vesey, Sr., 2), and Holmes vs. Cowgill (7 Vesey, 498, and 12 Vesey, 206), it is shown that Atkyn reported Bainton vs. Ward inaccurately, and that it was a case in which the power had been *fully executed*.

This "settled doctrine" has, it is true, been latterly changed in England, by the statute of 6 George IV., ch. 16, sec. 77, by which it was provided that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." This provision was copied in the English bankrupt acts of 1861 and 1869. (Robson on Bankruptcy; note 1 to Thorpe vs. Goodall, 17 Vesey, 393, Sumner's edition; 4 Kent's Commentaries, side page 339, note "b"; Hole vs. Escott, 2 Keen's Ch. R., 448–455.)

But there is no such statute in Kentucky, and no such provision in the United States bankrupt act.

Our bankrupt act was copied from the English acts, but that provision was omitted, presumably with intelligence and motive. It is immaterial to inquire whether Congress refused to enact such a clause because powers were so comparatively unimportant in this country, or because it was deemed unjust to take the property of a

third party to pay the bankrupt's debts. Chief Justice Gibson, in Commonwealth vs. Duffield, (12 Pa. Sta., 281), says the provision of the *English* bankrupt act is "not to do justice, but to foster credit, right or wrong." It is sufficient, however, to say that no such statute was enacted, and no such policy prevails here.

Our act only vests in the assignee the bankrupt's "property and estate, real and personal," and his "choses in action," etc. (United States Revised Statutes, sections 5,044–5,046.) And, as we have seen, and as was held by the learned court below, "a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee." (Opinion of Ballard J., hereafter referred to.)

"Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take *such estate only* as the bankrupt had a *beneficial*, as well as *legal*, *interest* in, and which is to be applied to the payment of his debts." (Bump on Bankruptcy, 10th edition, page 493; Rhoads vs. Blackiston, 106 Mass., 336; Blin vs. Pierce, 20 Vermont, 29; Ontario vs. Mumford, 2 Barbour's Ch., 616; Hynson vs. Burton, 5 Arkansas, 496.) Those cases are quite instructive as showing the recognized construction of the bankrupt act, in this country and in England, as to what passes to the assignee. In Nichols vs. Eaton (1 Otto, 717) it was held that the chance of a bankrupt's becoming the owner of property by the exercise in his favor of a discretionary power by his mother's executor, did not render the property such assets of the bankrupt as would pass to his assignee. In *in re* Sutherland (6 Bissell, 526) it was held that a certificate of membership in a board of trade, being a mere power or privilege to make money by trading on the board, when the bankrupt desired, was not assets, and did not pass to the assignee.

The learned counsel for the appellant endeavor to supply the lack of a statute, by quoting the heading to No. 4 of Schedule "B" of the Forms in Bankruptcy; by which the bankrupt is required to file a list of "property in reversion or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or to charge."

That "form" has the dignity and force neither of a statute nor a decision. The statute could not be enlarged by a "form," so as to take property from a third person and give it to the assignee. Congress alone, and not the form makers, could do that.

But even if such a violent effect *could* have been produced by such a mere "form," that form evidently did not design to accomplish it. It does not say that powers shall *pass* to the assignee. It only says that the bankrupt shall *mention* in his schedules what powers he has. His *mentioning* them does not pass them to the assignee.

Exempt property is also required to be mentioned and inserted in the same schedules; but it will hardly be contended that it is thereby vested in the assignee.

The purpose of requiring the bankrupt to *mention* the *powers* he holds, is to enable the assignee to *understand* the whole state of his affairs, to examine what sort of power it is, and to see whether it has not been *executed*. For, as we shall hereafter see, if the power has been executed, the courts may then intercept the estate and give it to the creditors. The form very properly provides that the bankrupt shall disclose everything, so that the court and the assignee, and not the bankrupt, may see and judge whether it was such a power as gave a right to the assignee.

And this view (that the purpose of the "form" was not to *pass* estate or to *create* rights, but only to cause the bankrupt to mention all about his affairs, so as to inform the assignee of them) is confirmed by the very form itself. For the words of the form are general, and embrace every "power to dispose of property" which the bankrupt holds. It embraces all powers of attorney which the bankrupt may hold to sell property of others; and all powers of sale which the bankrupt may have as the executor, or as the trustee, of third persons. It also embraces those limited powers of revocation and appointment, which the bankrupt can only exercise in favor of others, and not of himself.

Now, it is very proper that there should be a form requiring the bankrupt to mention these things in his schedules, so that the assignee may examine into them in connection with the bankrupt's business affairs; but it would be monstrous to construe such a mere form into a statute divesting the estates of third persons, concerning which the bankrupt had simply a naked and unexecuted power.

We do not deny that there is strong authority in England to the effect that if Clifton had ever *executed*, or attempted to execute the power, the property would have thereby become his assets, and would have passed to the assignee. The theory of those cases is, that when the holder of the power exercises it, he lifts the estate out of the original grantee, and equity will then intercept it before he is allowed to vest it in another, and will apply it to his debts. The idea is, that when, by the exercise of his power, he lifts the estate out of the grantee, it becomes his own, and he shall not be permitted to give it to any one else before he shall have paid his debts. (2 Sugden on Powers, side page 27; Story's Eq. Jurispru., sections 169 and 176, note, and cases cited; 4 Kent's Comm., side page 339.)

But this doctrine has been severely criticized in America, and it is doubtful if it prevails here. It is inconsistent with the fundamental principle that the donee under a power takes, not from the holder of the power, but from the original grantor, the creator of the power. (2 Atkyn, 562; 12 Pa. St., 279; 2 Sugden on Powers, side page 30.)

It is not very clear now the courts can apply the property to the debts of the holder of the power, when he attempts to execute it in favor of a third person, if that third person is to take title, not under the holder of the power, but under the original grantor. It is

as illogical as if the courts were to seize the estate which one tries to convey under an ordinary power of attorney, and apply it to the payment of the attorney's debts.

This, and similar inconsistencies, led Chief Justice Gibson to repudiate the doctrine as "arbitrary," as a "shallow equity," as a "flagrant injustice," as "revolting," as "bred by the temper of the bankrupt laws, whose design is not to do justice but to foster credit," and as "robbing Peter to pay Paul." (Commonwealth vs. Duffield, 12 Pa. St., 279-281.) The case is a very instructive one. In Mr. Perry's note to the 12th edition of Story's Equity Jurisprudence, section 175, it is said: "The distinction is a nice one, and not very satisfactory. Why, when the party executes a power in favor of others and not of himself, a court of equity should defeat his intention, although within the scope of the power, and should execute something beside that intention, and contrary to it, is not very intelligible. If it be said that he ought to be just before he is generous, that addresses itself merely to his sense of morals. The power enabled him to give either to himself or to his creditors, or to mere voluntary donees. Why should a court of equity restrict this right of election, if *bona fide* exercised? Is not this to create rights not given by law, rather than to enforce rights secured by law? If the power was *bona fide* created, why should a court of equity interpose to change its objects or its operations?" See also 2 Leading Cases in Equity (last edition), 378; Lines vs. Darden, 5 Florida, 79.

The illogical character of the English rule has led to the curious results, that the creditors must first exhaust the other estate of the holder of the power, before they can come in on the property over which he has attempted to execute the power (Leading Cases in Equity, vol. 2, 378; 1 Merrivale, 639; 3 De Gex, Mac., and Gord., 976); and that an attempt to execute the power after bankruptcy would render the property liable only to his debts created subsequent to the bankruptcy. (Jenney vs. Andrews, 6 Maddock's Ch. R., side page 264; Johnson vs. Cushing, 15 New Hamp., 315.)

The cases in 6 Madd. and 15 N. H. strongly illustrate the fact that the power is not an asset in which the creditors, existing at the time of the bankruptcy, have any interest.

This question, however, is not material to this case, and is only referred to as illustrative of the fact that an unexecuted power is not an asset.

It is not alleged that Clifton has ever executed, or attempted to execute, the power.

IV.

It was next contended in the court below by the learned counsel for appellant, and may be contended here, that the court should compel the bankrupt himself to execute the power, in favor of the assignee, for his creditors.

This bill in equity was not shaped for that purpose, and we think it clear that no such decree could have been entered upon the issues in this case. No such relief is prayed for in the pleadings.

Nor, if the pleadings would allow it, could such relief be granted. "It is an immutable rule, that a non-execution shall never be aided." (2 Sugden on Powers, side page 157.) "Where the power is not executed, equity can not assist the creditors." (*Ibid*, vol. 2, side page 102.)

In Thorpe vs. Goodall (17 Vesey, 388 and 460), one having a general power of revocation and appointment went into bankruptcy. His assignee filed a bill to compel him to execute the power in favor of his creditors. It was held by Lord Chancellor Eldon that a court could not compel the execution of a power, and he dismissed the bill.

The same doctrine is stated fully in Holmes vs. Cowgill, 7 Vesey, 498, and 12 Vesey, 206; Townshend vs. Wyndham, 2 Vesey, Sr., 3; 1 Sugden on Powers, 225; Johnson vs. Cushing, 15 N. Hamp., 308; Howard vs. Carpenter, 11 Maryland, 282; Wilkeson vs. Getty, 13 Iowa, 157; Story's Equity Jurisprudence, sections 176 and 169; 1 Leading Cases in Equity (last edition), 368; 2 Leading Cases in Equity, 368; 4 Greenleaf's Cruise on Real Prop., side page 229; Harrison vs. Battle, 1 Devereux & Battle, Eq., 215.

V.

The learned counsel for appellant next contend that the voluntary petition, and the adjudication in bankruptcy, and the register's deed to the assignee of all of Clifton's assets, operated as, and was equivalent to, an execution of the power, by Clifton, for the benefit of his assignee and creditors.

There is nothing in the terms of the petition or the adjudication which would accomplish this; and the register's deed says nothing of the power.

The proposition of the learned counsel is in the face of all the authorities we have cited; in which it was held that the assignee in bankruptcy is not entitled to the property. (Thorpe vs. Goodall, 17 Vesey, 388, 460, etc.) Those cases could never have been decided as they were, if the bankruptcy operated *per se* as an execution of the power.

The proposition is also opposed to the recognized rule that the execution of a deed of assignment by the holder of a power is presumed to relate only to his property, and will not affect the power unless it is especially embraced.

"The general rule of construction both as to deeds and wills is, that if there be an interest and a power existing in the same person, over the same subject matter, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power. If there is any legal interest on which the deed can

attach, it will not execute a power." (4 Kent's Commentaries, side page 334; Pease vs. Pilot Knob Co., 49 Missouri, 127; 2 Washburn Real Prop., side page 325, sec. 33.)

"If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power." (Pomfret vs. Perring, 5 De Gex, Mac. and Gord., 781; Wildbore vs. Gregory, Law Reports, 12 Equity, 487.)

It was substantially upon these views, and upon these authorities, that the court below dismissed the appellant's bill. The opinion of the lamented Judge Ballard is replete with his rare learning, and is written with his characteristic acumen and power. It is printed in the National Bankrupt Register, vol. 18, page 126, and the American Law Register, new series, vol. 17, page 713.

We respectfully ask an affirmance.

BIJUR & DAVIE, for Appellees.

Martin Bijur
Counsel for Appe

No 695

Circuit Court of the United States

FOR THE DISTRICT OF KENTUCKY.

STEPHEN E. JONES, ASSIGNEE OF CHARLES H. CLIFTON,
vs.
CHARLES H. CLIFTON AND NANNIE W. CLIFTON.

The opinion of the Court was delivered by BALLARD, Circuit Judge.

The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a separate statement: 1. That the making of the two instruments was a contrivance and scheme on the part of Charles H. Clifton to cheat, hinder, and defraud his *future* creditors. 2. That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. 3. That by operation of the Bankruptcy Act, the property described in the instruments, or, at least, the powers of revocation therein reserved, passed to the complainant as assignee in bankruptcy.

I shall examine each of these grounds separately. The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate. That Clifton might, under these

circumstances, by *proper conveyances*, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee in bankruptcy, is indisputable. The authorities everywhere sustain such settlements.—(*Sexton* v. *Wheaton and Wife*, 8 Wheat., 229; *Hinds, Lessee*, v. *Longworth*, 11 Id., 211–213; *Haskell* v. *Bakewell*, 10 B. Mon., 206; *Lloyd* v. *Fulton*, 91 U. S., 485; *Smith* v. *Vodges*, 92 Id., 183.) Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant themselves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by *proper* conveyances; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved, they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is *per se* fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one and the same with it. I proceed, therefore, to consider the second ground.

Under the common-law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence, which, coming down to us from the ancient civilization, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence, which in England and in this country has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to

the exclusive use of a married woman without the intervention of trustees, but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that whenever * * * property * * * is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also."—(2 Story's Eq. Jurisp., sect. 1380.)

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her will be enforced in the same manner and *under the same circumstances that* it will be when made by a stranger, or when made to a trustee for her exclusive use.—(*Shepard* v. *Shepard*, 7 Johns. Ch., 56; *Jones* v. *Obenchain*, 10 Gratt., 259; *Sims* v. *Rickets*, 35 Ind., 192; *Thompson* v. *Mills*, 39 Id., 532; *Putnam* v. *Bicknell*, 18 Wis., 335; *Burdeno* v. *Amperse*, 14 Mich., 91; *Barron* v. *Barron*, 24 Vt., 398; *Marraman* v. *Marraman*, 4 Met., (Ky.,) 84; *Wallingsford* v. *Allen*, 10 Pet., 594.)

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none, which hints that a reasonable settlement made by a husband, free from debt, on his wife, by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void (*Riggs* v. *Murray*, 2 Johns. Ch., 576; S. C., 15 Johns., 571; *Tarback* v. *Marbery et al.*, 2 Vern., 570); but such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of *Riggs* v. *Murray*, Chancellor KENT expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family

connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the *sole* object of the *settlement* is to guard against the extravagance and imprudence of the settlor. Indeed, ever since Lord HARDWICKE's time the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud.—(*Hugenin* v. *Basely*, 14 Ves., 273.)

In some of the later cases such settlements have been annulled at the suit of the settlor, apparently on the sole ground that they did not contain a power of revocation.

In *Coutts* v. *Acworth*, Law Rep., 8 Eq., 558, it was held that "the party taking a benefit under a voluntary settlement * * * containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable."

In *Wallaston* v. *Tribe*, Law Rep., 9 Eq., 44, the same rule is recognized and enforced.

In *Everett* v. *Everett*, Law Rep., 10 Eq., 405, the Chancellor, in annulling a deed of settlement made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settlor and her children, if she married, had I been called on for advice I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'"

In *Phillips* v. *Mullings*, Law Rep., 7 Ch. App. Cases, 244, the Court of Appeal recognizes the same general rule, but in that case refused to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice."

"Those who induce," said the Lord Chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. * * * It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood."

In *Hall* v. *Hall*, Law Rep., 14 Eq., 365, the Vice-Chancellor regarded the rule as so firmly settled, that he felt impelled to annul a settlement twenty years after its execution, simply because it did not contain a power of revocation. The same rule has been recognized and adopted in the United States.—(*Russell's Appeal*, 75 Penna. St., 269; *Garnsey* v. *Mandy*, 24 N. J. Eq., 243.)

Some chancellors have intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of *Hall* v. *Hall*, decided by the Court of Appeals in Chancery, in 1873.—(Law Rep., 8 Ch. Ap., 430.) I quite agree with what Sir W. M. JAMES, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him; and it seems very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power."

The true rule is that laid down by Lord Justice TURNER, in *Toker* v. *Toker*, 3 DeG., J. & S., 487, 491, that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstances of each case.

In the case now before me, I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by him to annul the settlements. To such a suit the chancellor might have said, as Chancellor HATHERLEY did in *Phillips* v. *Mullens*: "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance. Of what advantage would it have been to place the money in this

connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the *sole* object of the *settlement* is to guard against the extravagance and imprudence of the settlor. Indeed, ever since Lord HARDWICKE'S time the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud.—(*Hugenin* v. *Basely*, 14 Ves., 273.)

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made in respect to the power of a married woman over her separate estates.

The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second section of the Statute of 27 Elizabeth, the substantial right to revoke and annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice.—(*Dolphin* v. *Aylward*, Law Rep., 4 Eng. and Irish Appeals, 486; Roberts on Conveyances, 39–41.) A grantor may therefore revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to purchasers, and consequently such settlements can not be defeated by subsequent creditors.—(*Dolphin* v. *Aylward*, *supra*.) So, also, the fifth section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, cannot be assailed by creditors, unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that, therefore, it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife.—(Bishop on the Law of Married Women, sect. 717.) The cases usually cited to support this view are *Beard* v. *Beard*, 3 Ark., 71; *Moyse* v. *Gayles*, 2 Vern., 385; *Stoit* v. *Ayloff*, 1 Ch. Rep., 33.

Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the Supreme Court of the United States, and to the whole current of later authority.

When the settlement is made by a husband free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity, whilst they substantially admit that the provision made by Clifton for his wife was reasonable, whilst they admit that the grants made by him are not void, simply

because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is, that as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of a new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a *feme sole* when the conveyances were made to her. The husband's right and interest are not recognized in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is, that by operation of the bankruptcy act, the property embraced in these settlements, or at least the powers therein reserved, which might be exercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed, was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Sect. 5,053 of the Revised Statutes, provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to sections 5,044 and 5,046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or * * * register shall * * * assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the com-

mencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power, and authority to use, manage, dispose of, sue for and recover, or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee * * * be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, are not enumerated among the things which pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights, which do pass.

A power is not property or an estate. A power to convey or appoint property may be lodged in one having no interest whatever in the property over which the power is to be exercised or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A, to dispose of it as he should please, would invest him with a complete title; but a grant to A for life, with remainder to such person as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power.—(Sugden on Powers, vol. 1, p. 120; *Maundrill* v. *Maundrill*, 10 Vesey, 246; *Reed* v. *Shergold*, Id., 371; *Burleigh* v. *Clough*, 52 N. H., 272; *Collins* v. *Carlisle's Heirs*, 7 B. Mon., 13; *McGaughey's Admr.* v. *Henry, &c.*, 15 Id., 383.) So a conveyance by A to B and his heirs in trust for A for life, remainder to such persons or uses as A should appoint, and in default of appointment,

in trust for C and his heirs, would leave or vest in A a life estate only. Or, if A should convey to B in trust for himself for life, reserving to himself an absolute power of revocation, still A would have only a life estate in the property trusted. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of *Willard* v. *Ware*, 10 Allen, 263, certainly so understood the rule, else they need not have troubled themselves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The bankruptcy statute of 13 Eliz. "enables the commissioners to dispose of any estate, for such use, right, or title as such offender (bankrupt) then shall have in the same which he may lawfully depart withal." And the statute of 21 James I. directs bankrupt law to be expounded most favorably for the relief of creditors. I quite agree with Sir EDWARD SUGDEN when he says, that "as a power is a mere right" to declare the trust of an estate upon which declaration the Statute of Uses immediately operates, and, as it is therefore clearly a use, interest, or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had, but such was never in fact the construction of these statutes. In *Townshend* v. *Windham*, 2 Ves., Sr., 3, and in *Thorpe* v. *Goodall*, 17 Ves., 388, Lord KING is said to have held that in the case of a tenant for life, with power to charge 100*l*., the power was not such an interest as would pass to the assignees.

Holmes v. *Coghill*, 7 Ves., 498, was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding 2000*l*. Sir John was also entitled to other estates, remainder in tail to his eldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It expressly extinguished the power reserved in the settlement of 1757, but it directed the trustees to raise such sum, not exceeding 2000*l*., as Sir John should direct, and pay the same to him or his assigns;

or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of 2000*l.*, to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will, which bore date subsequent to the settlement of 1788, but it took no notice of this power.

The bill was filed by creditors. *Held*, by the Master of the Rolls, Sir WILLIAM GRANT:

First. That the power reserved in the original deed of 1757 was discharged by the deed of 1787.

Second. The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787.

Third. There is an evident difference between a power and an absolute right of property.

Fourth. Equity will aid the defective execution of a power, but it cannot itself execute a power.

The case was affirmed on appeal, 12 Vesey, 206. On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted, that, as the donor had the same power over the estate which he has over his own estate, it should, in equity, at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in suport of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In *Thorpe* v. *Goodale*, 17 Ves., 388, S. C., Id., 460, one who had been adjudged a bankrupt was seized for life of a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. *Held* by Lord ELDON that equity cannot compel the execution of the power.

The learned chancellor, it is true, says that the question whether the power passed by operation of law to the assignee was not before him, but he refers to the opinion imputed to Lord KING in such terms as to show that he approves it.

Sir EDWARD SUGDEN says, in his work on Powers, vol. 1, p. 225, that upon a bill filed by the assignees against the purchaser in this same case, the vice-chancellor was of opinion that the power did not pass to the assignee. He cites *Thorp* v. *Frere*, (N. C., M. T., 1819,) but I have not been able to find the case reported.

These decisions, doubtless, led to the enactment of 6 Geo. IV., 16, 5, 77. This statute provides that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every bankrupt act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted *ex industria*. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English bankrupt acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the settlor in his settlement might be exercised for his own benefit, it is clear that if he was a bankrupt in England, his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here, as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignees.

I have no doubt that, in respect to the property which does pass, under our statute, to the assignee, all the power and dominion which the bankrupt had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5,050, may be required to execute any instruments, deeds, and writings which may be proper to enable the assignee to

possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds, or writings. He cannot be required to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But complainant's counsel insist that the justices of the Supreme Court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this, they refer to schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (section 4,490).

It is true that the caption of schedule B implies that the petitioner shall include therein "property in reversion, remainder, or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall *mention* all "rights and powers wherein I (he), or any other person or persons in trust for me (him) or for my (his) benefit have any power to dispose of, charge, or exercise."

No one more readily than I would submit to a decision of the Supreme Court, but I cannot regard this schedule, though nominally prescribed by its justices, as a decision of the court. The judges cannot in this way give an authoritative construction to the statutes,

Besides, the schedule does not purport to be a construction of the statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest; but the petitioner cannot be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked